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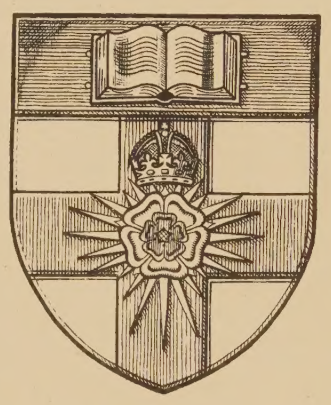

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Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re POOLEY.

C. A.
1888
Oct. 31.

Will—Gift to Attesting Witness—Power to Solicitor-Trustee to make Professional Charges—Wills Act (1 *Vict. c.* 26), *s.* 15 [*Revised Ed. Statutes, vol. viii., p.* 33].

A testatrix appointed *B.* and *P.* (a solicitor), executors and trustees of her will, and declared that any trustee of her will who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. *P.* was one of the attesting witnesses:—

Held (affirming the decision of *Stirling*, J.), that *P.* was not entitled to any profit costs for business done by him in relation to the estate, for that the right to make professional charges could only be claimed under the will, and was a beneficial interest under it, from claiming which he, being an attesting witness, was precluded by the *Wills Act* (1 Vict. c. 26), s. 15.

In re Barber (1) approved.

JANE JOHNSON died in July, 1887, leaving a will, by which she appointed *H. C. Brown* and *Edmund Pooley* the trustees and executors thereof. The will contained the following clause: "I declare that any trustee of this my will who may be a solicitor shall be entitled to charge my estate for all business done by him in relation to my estate in the same manner as if he had been engaged to do such business by my executors as their solicitor."

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C. A. 1888 *In re* POOLEY.

Pooley, who was a solicitor, was one of the attesting witnesses to the will, and proved the will on the 30th of July, 1887, power being reserved to *Brown* to come in and prove. On the 15th of February, 1888, *Pooley* delivered his bill of costs and disbursements, and on the 2nd of March, 1888, the tenant for life and *Brown*, the co-trustee, obtained the common order for its taxation.

The Taxing Master taxed the bill according to the decision of Mr. Justice *Chitty* in *In re Barber* (1), disallowing all professional costs, and so reducing the bill from £55 11*s.* 5*d.* to £2 14*s.* *Pooley* took out a summons to review this taxation, which was adjourned into Court and dismissed by Mr. Justice *Stirling*, who followed Mr. Justice *Chitty's* decision.

Pooley appealed.

Cozens-Hardy, Q.C., and *W. F. Hamilton*, for the Appellant:—

We contend that this disposition is not within the *Wills Act* (1 Vict. c. 26), s. 15. It is not a "beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate." Were it not for the rule in equity that a trustee shall not make a profit out of his office, a trustee-solicitor would be able to make professional charges for business done by him for the estate, and all that this clause does is to negative the application of that rule of equity. Mr. Justice *Stirling* followed Mr. Justice *Chitty's* decision in *In re Barber*. That case may be distinguished, on the ground that the trustee there was mentioned by name; but apart from that we submit that Mr. Justice *Chitty's* view that this is a legacy affecting real or personal estate is not a just one. A legacy imports a bounty, here the trustee is only to be paid for the work he does, he gives a full consideration.

[COTTON, L.J.:—Suppose a testator said, "I give to every person who shall be a trustee of my will £10 for his trouble," would that not be a legacy?]

No doubt it would, but that is a gift of a definite sum irrespective of the work done; here the trustee is only to be paid according to the value of his services. If a disposition of this

(1) 31 Ch. D. 665.

kind is a legacy, then legacy duty ought to be paid on it, and it is quite a novel idea that a trustee entitled to make professional charges should pay legacy duty on them. If it is a legacy, it is primarily payable out of the personal estate. Now, suppose a will disposing of real and personal estate in different ways. If a solicitor, not a trustee, does business in respect of the real estate, his charges are paid out of the realty, but if a solicitor-trustee, who is authorized to charge, does it, then, if the right to be paid is a legacy, the payment must be primarily out of the personal estate. We have thus the anomalous result of the costs being paid out of different funds in the two cases.

[BOWEN, L.J.:—Is not a disposition of this kind within the policy of sect. 15?]

The clause must be construed according to its terms and is not to be extended by looking to its policy: *Gurney* v. *Gurney* (1); and we say that this case does not come within the fair interpretation of the terms. In *Gurney* v. *Gurney*, *Temple* clearly obtained an indirect benefit of considerable amount by the codicil, and the case might be said to come within the policy of the Act.

Wintle, for the Respondents, was not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, who followed a former decision of Mr. Justice *Chitty* (2). I am of opinion that Mr. Justice *Chitty's* decision was right and that Mr. Justice *Stirling* was right in following it. The question is whether under sect. 15 of the *Wills Act* (1 Vict. c. 26), a direction in the testatrix's will that every trustee of the will who is a solicitor shall be entitled to charge for professional business done for the estate, is void as regards *Pooley*, by reason of his being an attesting witness to the will. In my opinion, it is void as regards him. *Pooley* as a trustee of the will could not, in the absence of any direction in the will, do professional work for the estate and charge profit costs. It is urged that if we hold a

(1) 3 Drew. 208. (2) 31 Ch. D. 665.

C. A. 1888 *In re* POOLEY. Cotton, L.J.

clause enabling a trustee to do so to have the effect of giving him a legacy, a difficulty will arise, for that in that case a solicitor-trustee will be liable to legacy duty on his profit costs. I decline to give any opinion on that point, it may hereafter come before us for decision, and I do not wish to bind myself upon it; but that consideration ought not to prevent us from giving a fair construction to the words of the enactment now before us. The section enacts: "That if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void." It is urged that if we hold this to be a legacy to Mr. *Pooley* it will be a legacy to any future trustee of the will who may be a solicitor, and that the consequences as to legacy duty will follow. That may possibly be so, but as regards the Appellant we have only to consider whether this direction is not in substance a gift to him of so much of the estate as is required to pay the profit costs, and therefore void. It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section.

LINDLEY, L.J.:—

I think it is impossible to escape from the words of the section, and the case appears to me to fall within its policy. I think that under the old law Mr. *Pooley* would have taken by force of this clause such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Act was to leave the will good and to make void the gift which would have made the witness incompetent. Apart from this clause, Mr. *Pooley* could not get anything out of the estate for his services, and I cannot say that a clause which enables him

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to get something out of the estate is not a gift to him within the meaning of the 15th section.

BOWEN, L.J.:—

I am of the same opinion.

Solicitor for Appellant: *C. H. Bryson.*
Solicitors for Respondents: *Lowe & Co.*

H. C. J.

In re TURCAN.

C. A. 1888 *July* 5; *Nov.* 1.

Settlement—Covenant to settle after-acquired Property—Property acquired by Devise, Purchase, or otherwise—Divisible Covenant—Validity—Policy of Life Insurance—Condition in Policy against Assignment—Public Policy—Settlement of whole Property—Whether enforceable at Law or in Equity.

A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition that "it should not be assignable in any case whatever":—

Held, that the policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant, and that the covenant was divisible, and could be enforced as to that property by a Court of Equity.

Whether, if the policies had not come under any of the particulars specifically mentioned in the covenant, the covenant comprising the settlor's whole future property could have been enforced by a Court of Equity, *quære*.

Held, also, that the effect of the condition against assignment was merely to make the policy non-assignable at law, as it would have been prior to the *Policies of Assurance Act*, 1867 (30 & 31 Vict. c. 144), and did not prevent the settlor from dealing with the beneficial interest in it in accordance with his covenant.

THIS was an appeal from an order of Sir *H. F. Bristowe*, Vice-Chancellor of the County Palatine of *Lancaster*.

By an indenture, dated the 13th of August, 1884, being the settlement made on the marriage of *J. G. Turcan* and *Edith A. Tonge*, a policy of insurance on *J. G. Turcan's* life, and certain household furniture and effects, were assigned to trustees upon

C. A. 1888 *In re* TURCAN.

the trusts therein declared. And *J. G. Turcan* covenanted that if at any time during the marriage he should become possessed of or entitled by devise, payment, purchase, or otherwise, of or to any property or estate, whether real or personal, he would convey or assign his estate and interest therein to the trustees of the said marriage settlement, that the same might be held by them upon the trusts thereinbefore declared concerning the trust estate comprised in the said settlement.

Subsequently to the marriage *J. G. Turcan* effected the following policies on his own life:—

A policy against death by accident for £1000 in the *Lancashire and Yorkshire Accident Insurance Company*. This policy contained a condition that the company should not be bound to notice or be affected by notice of any trust, equitable charge, or lien; and also a special proviso "that this policy shall not be assignable in any case whatever." A policy against death or disablement from accident for £500 in the same company. An ordinary life policy for £500 in the *Queen Insurance Company*. The two last-mentioned policies did not contain the special proviso that the policy should not be assignable.

Turcan also purchased shares in various companies; but they were not of much value, and did not form the subject of argument before the Court of Appeal.

J. G. Turcan was accidentally drowned on the 1st of August 1887, and the three sums of £1000, £500, and £500 were accordingly paid to his executor.

A petition was presented to the Palatine Court by the executor to have the question decided whether the policies and shares acquired by the testator after his marriage were bound by the covenant in the marriage settlement.

The Vice-Chancellor held that they were bound by the covenant, and directed the shares and the moneys received on the policies to be handed over to the trustees.

The executor appealed from this decision.

The appeal came on to be heard on the 5th of July, 1888, but stood over to await the result of an appeal to the House of Lords in the case of *Official Receiver* v. *Tailby* (1), in which a similar

(1) 18 Q. B. D. 25.

covenant to that contained in *Turcan's* marriage settlement was considered. That case was heard by the House of Lords on the 30th of July, 1888, when the judgment of the Court of Appeal was reversed (1).

The appeal now came on again for hearing.

Henn Collins, Q.C., and *T. R. Hughes*, for the Appellant:—

We contend in the first place that this covenant is so wide as to bring it within the rules against general covenants in restraint of trade. The words "or otherwise" include the whole future property of the covenantor, and the effect of the condition would be to prevent him from getting his living. This is against public policy: *Mitchel* v. *Reynolds* (2). And even if it would not be void at law it is so wide that a Court of Equity will not interfere to enforce it: *In re Clarke* (3); *In re Count D'Epineuil* (4); *Belding* v. *Read* (5); *Clements* v. *Matthews* (6); *Hardey* v. *Green* (7); *Lewis* v. *Madocks* (8); *Bennett* v. *Cooper* (9); *Holroyd* v. *Marshall* (10). The principle of those cases was recognised in *Official Receiver* v. *Tailby* (11), although it was held that the covenant was in that case divisible. In the present case the question of divisibility does not arise, because if these policies are "property" at all within the meaning of the covenant, which we deny, they do not come under any of the particular kinds of property mentioned in the covenant. The policy-moneys were acquired neither by devise, bequest, nor purchase.

Secondly, we say that the policy-moneys were not "property" at all within the meaning of the covenant. They only came into his estate after his death; they cannot come under the description of property acquired "during his marriage."

Thirdly, as to the policy for £1000, that is expressly made unassignable, therefore it would have been impossible for the

(1) 13 App. Cas. 523.
(2) 1 P. Wms. 181; 1 Sm. L. C. 9th Ed. 430.
(3) 35 Ch. D. 109; 36 Ch. D. 348.
(4) 20 Ch. D. 758.
(5) 3 H. & C. 955.
(6) 11 Q. B. D. 808.
(7) 12 Beav. 182.
(8) 8 Ves. 150; 17 Ves. 48.
(9) 9 Beav. 252.
(10) 10 H. L. C. 191.
(11) 18 Q. B. D. 25; S. C. in H. L. 13 App. Cas. 523.

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trustees during the covenantor's life to have enforced the covenant, and they can have now no right to the proceeds of it.

Neville, Q.C., and *P. O. Lawrence*, for the trustees of the settlement:—

These policies were "property" within the meaning of the covenant. They would have passed to the trustees in bankruptcy of the settlor, and that has always been considered a good test of property. They became the property of the settlor, not on his death, but directly the policies were effected, and the property in them in equity passed to the trustees when the covenant was executed: *Holroyd* v. *Marshall* (1). They were also property acquired by purchase. The premiums paid for them were the valuable consideration for them. Then was the covenant too wide?

[COTTON, L.J.:—We are all of opinion that the general question does not arise here. If the policies are property, they come within one of the particulars in the covenant.]

In that case the only difficulty arises with respect to the policy for £1000. But the settlor could not get out of his covenant to assign the property by contracting with a third party not to assign it. If so, he could defeat his covenant with respect to any property which he might acquire. The condition in the policy was intended to have no such effect. It was only intended to prevent the policy from being assignable at law under the 30 & 31 Vict. c. 144, so that the office might not be obliged to accept the receipt of the assignee. But that did not prevent the settlor from passing the beneficial interest in the policy money to the trustees of his settlement in accordance with his covenant.

T. R. Hughes, in reply.

COTTON, L.J.:—

This is an appeal from an order of the Vice-Chancellor of the County Palatine, made on the petition of the executor of *J. G.*

(1) 10 H. L. C. 191.

Turcan, declaring that, as between *Turcan's* executor and the trustees of his marriage settlement, the trustees were entitled to three policies of insurance on his life and certain shares which were of small value, and about which there has been no question in the appeal. The hearing of the appeal stood over because we were informed that an appeal was pending before the House of Lords in a case of *Official Receiver* v. *Tailby* (1), which had a material bearing upon the question in the case before us. That appeal has now been decided, and certainly has some bearing upon the present case.

The question turns on the construction of a covenant in the testator's marriage settlement, by which he covenanted that if at any time during the marriage he should become possessed or entitled by devise, bequest, purchase, or otherwise, of or to any property or estate, real or personal, he would convey or assign it to the trustees of the marriage settlement.

The first point that was made before us was that the whole covenant was against public policy and void, as being a covenant to dispose of the covenantor's whole means of livelihood. We do not think that is so, there being no question of restraint of trade. But it is a different question whether the covenant is not so wide that a Court of Equity would refuse to enforce it, and would leave the trustees to prove against the estate of the covenantor for breach of the covenant like ordinary creditors. Possibly the Court would refuse to enforce this covenant as a general covenant to assign all the settlor's property; but it is not necessary to decide that point, because another question arises here, namely, whether a Court of Equity will not enforce the covenant with regard to the policies on the ground that the covenant is divisible, and that the policies are within one of the classes of property specially mentioned. That is really the question in this case. It has been decided in *Official Receiver* v. *Tailby* (2), approving the decision in *In re Clarke* (3), that where a covenant is divisible, and the property in question can be brought within any particular class mentioned in the covenant, the covenant may be enforced as to that property, although it may not have been in existence at

(1) 18 Q. B. D. 25. (2) 13 App. Cas. 523.
(3) 35 Ch. D. 109; 36 Ch. D. 348.

C. A. 1888 *In re* TURCAN. Cotton, L.J.

the time of making the covenant, and although it may not be assignable at law. I think that the covenant in this case is divisible. If we had to deal with these policies as not coming within any of the particulars mentioned in the covenant, we should have to decide the general question whether such a covenant could be enforced in equity; whether as including in its language all property which might come to the covenantor, it would have any effect at all in equity. But in my opinion we are not called on to decide that point, because the policies come within the class of property acquired "by purchase" during his life. It was contended that they did not come within the meaning of this term; but in my opinion they may be properly considered as acquired by purchase during his life. They are contracts under which the policy-holder has a right to recover certain sums of money from the insurance office in certain events, and the premiums which he pays may be considered as money paid as an investment, so as to obtain for him the benefit of the policies.

There was another point argued about which we had some doubt, arising out of the condition annexed to the policy for £1000 that it should not be in any case assignable. But the policy contains another condition, shewing that the insurance office recognised the right of the insured to part with his interest, for it provided that the company should not be bound by notice of liens and charges on the policy. Would a Court of Equity in the lifetime of the covenantor have enforced the covenant to settle this policy notwithstanding the condition against assignment? I think it would. Before the Act of 1867 (30 & 31 Vict. c. 144) a policy could not be assigned at law, but now it can: and I think the condition was inserted in order to prevent the insured from availing himself of his power to assign the policy and to give the assignee a right to receive the money from the office. But though he could not assign the policy, I think it would have been a sufficient compliance with the covenant if he had executed a declaration of trust for the trustees of the settlement, just as he might have done before the passing of the Act of 1867. Then he could not have assigned the policy or given the trustees the power to receive the money, but he might have given them all the benefit of the money when it

C. A. 1888 *In re* TURCAN.

was received. And I think he could have given them the same benefit in the present case by executing a declaration of trust.

Therefore, without deciding the general question to which I have referred, I must hold that the order of the Vice-Chancellor was right, and the appeal must be dismissed.

LINDLEY and BOWEN, L.JJ., concurred.

Solicitors: *Torr, Janeways, & Co.*, agents for *Avison & Co., Liverpool; Burton, Yeates, Hart, & Co.*, agents for *Tyrer, Kenion, Tyrer, & Co., Liverpool.*

M. W.

C. A. 1888 *Nov.* 2.

In re BALL.
SLATTERY *v.* BALL.

[1887 D. 1319.]

Will—Construction—Die without "leaving" Issue.

A testator bequeathed personal estate in trust for *K. B.* for life and after his death for *R. B.* and the heirs male of his body, and in case *R. B.* died without leaving issue male for *J. B.* *R. B.* died in the lifetime of *K. B.*, having had issue one son only, who died without issue in his father's lifetime:—

Held (affirming the decision of *North*, J.), that the gift over to *J. B.* took effect, for that the cases where "leaving" had been construed "having" in order to prevent a clear previous vested gift from being divested, did not apply where it was plain that the vested gift was in some event to be divested.

White v. *Hight* (1) overruled.

THIS was an appeal by the Plaintiff from a decision of Mr. Justice *North* (2).

The testator gave his residuary personal estate to trustees in trust for *William Keith Ball* for life, then for his children, and in default of children for *William Robert Ball* (in the will called *Robert Ball*) and the heirs male of his body, and "in case the said *Robert Ball* shall die without leaving issue male lawfully begotten," then the property was to go to *John Ball*.

The testator died in 1809. *William Robert Ball* died in 1844,

(1) 12 Ch. D. 751. (2) 36 Ch. D. 508.

C. A. 1888 *In re* BALL. SLATTERY *v.* BALL.

having had issue one child only, a son who died an infant in his father's lifetime. *William Keith Ball* died in 1874 without having had any child.

Mr. Justice *North* decided that the gift over to *John Ball* took effect (1). The Plaintiff, who was one of the next of kin of *William Robert Ball*, appealed from this decision.

Kenyon Parker, for the Appellant:—

The established rule is that a clear vested gift is not to be cut down by ambiguous expressions, and the word "leaving" will not be taken in its strict sense where the effect would be to defeat a vested interest, but will be construed "having:" *In re Jackson's Will* (2). Though there is no gift to issue, the reference to them indicates an intention to benefit the family, and the general intention shewn by the will is best effected by taking "leaving" to mean "having," and so letting the vested gift to *William Robert Ball* remain undivested. *White* v. *Hight* (3) is precisely in point. It is needless to cite the cases which are referred to in the judgment of Mr. Justice *North*.

Crackanthorpe, Q.C., and *Dauney*, for the Respondent, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North* ordering the statement of claim to be struck out as against one of the Defendants, on the ground that it shews no title in the Plaintiff. The House of Lords has decided that the testator's will did not effect a conversion in equity of the testator's personal estate into realty, and the will therefore must be read as a will of personal estate. The testator directed that in the events which have happened his estate should go to and for the use of *William Robert Ball* and the heirs male of his body lawfully begotten, "and in case the said *William Robert Ball* shall die without leaving issue male lawfully begotten," then to *John Ball*. *William Robert Ball* died in 1844, leaving no issue living at his death, but having had

(1) 36 Ch. D. 508. (2) 13 Ch. D. 189, 194.
(3) 12 Ch. D. 751.

a son who died an infant in his lifetime. The question, then, is whether the gift over to *John Ball* took effect, and the Plaintiff, who is one of the next of kin of *William Robert Ball*, contends that the property vested absolutely in *William Robert Ball* and was not affected by the gift over. Now "leaving issue male" *primâ facie* means "leaving issue male living at his death." *William Robert Ball* did not leave any issue male living at his death, so according to the ordinary meaning of the words the gift over took effect. Cases were cited which were alleged to authorize the Court to put upon these words such a construction as not to defeat the gift to *William Robert Ball* in the events which have happened. In my opinion the cases do not do so. They decide that the Court will lean to a construction which will prevent gifts vested at birth or on any other definite event from being divested by death before a certain period. Thus, where there is a gift to *A.* for life and then to his children, with a gift over in case of his "not leaving issue," the gift over has not unreasonably been read "without having had a child," it being improbable that the testator meant the vested interests of children to be divested because they happened to die in the lifetime of their parent. But in my opinion the principle of those cases does not apply where it is clear that the testator means a vested gift to be divested in some event. Here it cannot be doubted that the testator intended the vested gift to *William Robert Ball* to be divested if *William Robert Ball* died without ever having had any issue male, and, as the vested gift was to be defeated in one event, I see no reason for straining the meaning of the testator's words to prevent its being defeated in another event.

The case of *White* v. *Hight* (1) is very like the present. It is not before us on appeal, but as it strongly supports the Appellant's case it is right to give our opinion upon it. I cannot agree with the decision of the Vice-Chancellor, which appears to me to be a wrong application of the rule on which he relied.

LINDLEY, L.J.:—

I am of the same opinion. I think that if we took a different view we should be running counter to a series of cases, beginning

(1) 12 Ch. D. 751.

C. A. 1888 *In re* BALL. SLATTERY *v.* BALL.

with *Forth* v. *Chapman* (1). The cases of *Maitland* v. *Chalie* (2), *Casamajor* v. *Strode* (3), and *Treharne* v. *Layton* (4), belong to an entirely different class, and it is a confusion of ideas to treat them as bearing on the present case. In *White* v. *Hight* (5) Vice-Chancellor *Bacon* applied the doctrine of *Maitland* v. *Chalie* to a will very like the present, but his decision stands alone, and I think it was wrong.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors; *R. C. Hanrott; Parker, Garrett & Parker.*

H. C. J.

C. A. 1888 *Nov.* 9.

In re MILLS' TRUSTS.

Trustee Act Extension Act, 1852 (15 & 16 *Vict. c.* 55), *s.* 2 [*Revised Ed. Statutes, vol. xi., p.* 326]—*Wilful Refusal or Neglect.*

A refusal by a trustee to convey is not wilful within the meaning of the *Trustee Extension Act*, sect. 2, if the title of the person asking for the conveyance is disputed and the trustee entertains a *bonâ fide* doubt as to it.

A copyhold was vested in a trustee under the will of *M.* The beneficial interest was vested as follows:—*A.*, *B.* and *C.* one-sixth each, *D.* one-fourth. As to the remaining fourth it was questionable whether under the will of *E.* it had passed to *A.*, *B.*, *C.* and *D.* in equal shares, or to *S. T.*, since deceased, of whose will *A.* and *F.* were the trustees. The copyhold was sold to *X.* and *A.*, *B.*, *C.* and *D.* as beneficial owners, and according to their respective shares and interests, and *A.* and *F.*, as trustees, conveyed it by deed to *X.*, the purchase-money being paid thus—to *A.*, *B.*, and *C.* one-sixth each, to *D.* one-fourth, and the remaining fourth to *A.* and *F.* *C.* shortly afterwards brought his action against the trustee under *M.*'s will, and *A.* and *F.*, as trustees of *S. T.*'s will, to establish that no share had passed under *S. T.*'s will, and that the purchase-money ought to have been differently apportioned. *Bacon*, V.-C., held that the fourth share had passed under the will of *S. T.*, and that the purchase-money had been rightly apportioned, and he accordingly dismissed the action. After this *X.* applied to the trustee to surrender to him, which the trustee declined

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(1) 1 P. Wms. 663.
(2) 6 Madd. 243.
(3) 8 Jur. 14.
(4) Law Rep. 10 Q. B. 459.
(5) 12 Ch. D. 751.

to do. *X.* then petitioned for a vesting order. Before the petition was heard, *A.* gave notice that she reserved all her rights under the will of *E.*:—

Held, that the refusal of the trustee was not wilful within the *Trustee Act Extension Act*, 1852, sect. 2, and that a vesting order could not be made.

Decision of *North*, J., affirmed.

THIS was an appeal by the Petitioner from the refusal of Mr. Justice *North* to make a vesting order (1).

Thomas Mills, who died in 1847, devised two copyhold messuages to trustees, upon trust, as to one of them, to pay the rents to his granddaughter *Sophia Thompson* for life, and after her decease to the use of such of her children as she should by will appoint, and in default of appointment to the use of such of her children as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares as tenants in common in fee, and if there should be no such child, then upon such uses and trusts for the benefit of his granddaughter *Elizabeth Bath* and her children as should correspond with and be similar to the uses and trusts expressed in favour of *Sophia Thompson* and her children. The trusts of the other messuage were similar, except that the limitations to *Elizabeth Bath* and her children came first.

Sophia Thompson never had a child. *Elizabeth Bath* had six children who attained a vested interest, viz., *Ellen Bath*, *Mary Bath*, *Elizabeth Bland*, *Thomas Bath*, *Henry Bath*, and *Laura Louisa Terry*. She died in 1867.

Mary Bath died intestate in 1870, and her brothers, *Thomas* and *Henry* were her co-heirs. They thus became entitled each to a fourth of the copyhold.

Thomas died in January 1877, leaving a will by which after a specific legacy he gave as follows: "Everything else belonging to me I leave to my aunt *Sophia Thompson*. More especially my share in the division of property when my sister, *L. L. Bath*, comes of age, I leave to my aunt *Sophia Thompson* for her own use as long as she lives, and at her decease to be equally divided between my sisters and brother." Administration with the will annexed was granted to *Sophia Thompson*.

(1) 37 Ch. D. 312.

C. A. 1888 — *In re* Mills' Trusts.

Sophia Thompson died in October, 1882, leaving a will, by which she gave all her property to her executors, *Ellen Bath* and *J. Fisher*, in trust for the children of *Laura Louisa Terry*. There were three of these children all infants.

On the 16th of March, 1883, *Ellen Bath* and *Fisher* were appointed trustees under the will of *Sophia Thompson*, for the purposes of the *Settled Land Act*.

On the 9th of April, 1883, by an indenture made between *Ellen Bath* of the first part, *Elizabeth Bland* and her husband of the second part, *L. L. Terry* and her husband of the third part, *Henry Bath* of the fourth part, *Ellen Bath* and *J. Fisher* of the fifth part, and *Bax* of the sixth part, the parties of the first four parts as beneficial owners, and "according to their respective shares, estates, and interests," and *Ellen Bath* and *Fisher* as trustees and by virtue of the *Settled Land Act*, conveyed the first mentioned copyhold to *Bax*, his heirs and assigns according to the custom of the manor. The total purchase-money was £1350, which on the face of the conveyance was paid one-sixth to each of the parties of the first, second, and third parts, one-fourth to *H. J. Bath*, and one-fourth to *E. Bath* and *Fisher* as trustees for Mrs. *Terry's* children. This went on the footing that *Thomas Bath's* share had gone to Mrs. *Thompson* absolutely.

At this time *J. B. Shillcock* was the surviving trustee of the will of *Thomas Mills*, and tenant on the court rolls. *Bax* applied to him to surrender the copyhold to him, which he declined to do, alleging that the deed of the 9th of April, 1883, passed only three-quarters of the equitable interest in the copyhold.

An action of *In re Mills, Bath* v. *Shillcock* was shortly afterwards commenced, in which *Henry Bath* was Plaintiff, and *Shillcock*, and *Ellen Bath* and *Fisher* as executors of *Sophia Thompson*, were Defendants, asking for administration of the trusts of the will of *Mills*, so far as related to the first-mentioned copyhold, and for all necessary accounts and inquiries to determine the interests of all persons in the proceeds of its sale. The statement of claim alleged that *Sophia Thompson* took only a life estate in *Thomas Bath's* share, and that the purchase-money of that share was divisible between his brother and sisters. Vice-Chancellor *Bacon* on the 11th of June, 1884, decided that *Sophia Thompson* took

that share absolutely and that it passed by her will. His Lordship accordingly dismissed the action.

Shillcock had died in April, 1884, and nothing further was done till *Bax*, being desirous of dealing with the property, served notice on the executors of *Shillcock*, as to one in December, 1886, and as to the other in July, 1887, calling on them to surrender the property to him. They having given no answer to these notices, *Bax* presented his petition for a vesting order on the ground that they had wilfully refused to surrender.

Mr. Justice *North*, on the 20th of December, 1887, expressed his opinion to be that the copyhold was not vested in *Shillcock's* executors, but in his customary heirs, and that a wilful refusal was not shewn (1). The petition was directed to stand over with liberty to amend.

The petition was accordingly amended with a view to shewing the title of the Petitioner to be so clearly made out that there was no reasonable ground for the trustees' declining to surrender. *Ellen Bath*, on the 12th of April, 1888, made an affidavit on behalf of the petition to prove some matters of pedigree. In this affidavit she said, "I make this affidavit without prejudice to my rights under the said will of my said brother, *Thomas Bath*."

The petition came on again before Mr. Justice *North* on the 23rd of June, 1888, and his Lordship retaining his opinion that the copyhold was not vested in the executors, dismissed the petition without entering into the consideration of the amendments. The Petitioner appealed.

Levett, for the Appellant:—

The *Copyhold Act* of 1887, passed on the 16th of September, before this petition came on to be heard. It contains no words defining when it is to take effect. I submitted that it was not retrospective, but Mr. Justice *North* held that it was.

[COTTON, L.J.:—Did you put the point that a refusal was only wanted to give the Court jurisdiction, and that you had applied to the persons in whom the legal estate undoubtedly was at the time?]

That point was not taken, and sect. 2 of the *Trustee Act*

(1) 37 Ch. D. 312.

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Extension Act, 1852, appears to make it necessary that the estate should be in the trustee at the time of the order. I contend that it was in the executors, for that the *Copyhold Act*, 1887, is not retrospective. The rule as to not construing statutes retrospectively is summed-up in *Hickson* v. *Darlow* (1). The cases on the subject, of which there are several, commence from an early period: *Helmore* v. *Shuter* (2).

[BOWEN, L.J., referred to *Hough* v. *Windus* (3).]

The words in this enactment point to futurity.

[COTTON, L.J., referred to sect. 50.]

There is nothing there to shew an intention that the Act should be retrospective. The same argument that the Act is to be construed as part of earlier Acts would apply to the *Bills of Sale Act*, which was held in *Hickson* v. *Darlow* not to be retrospective.

[LINDLEY, L.J.:—Does the 30th section of the Act of 1881 apply to copyholds at all? There are no words providing for a fine.]

Mr. Justice *Kay* in *In re Hughes* (4) decided that it does apply. The object of the enactment was to put the executors in the place of the customary heir.

[LINDLEY, L.J.:—May not sect. 45 of the *Copyhold Act of* 1887 have been passed to remove doubts as to the construction of sect. 30 of the Act of 1881?]

The clause is not in the least framed as a declaratory clause.

[COTTON, L.J.:—Supposing the copyhold was in the executors, can you say that their refusal to surrender was wilful?]

I submit that a refusal is wilful when made without any reasonable ground. Every person who in any possible view had any equitable interest in the copyhold joined in conveying to the Petitioner, and the parties conveyed "according to their respective shares, estates, and interests." After this one of the parties objected that the purchase-money had not been properly apportioned and brought his action. Vice-Chancellor *Bacon*

(1) 23 Ch. D. 690, 692.
(2) 2 Show. 17.
(3) 12 Q. B. D. 224.
(4) W. N. 1884, p. 53.

dismissed the action, and decided that the money had been properly apportioned. There has been no appeal from that decision. Under these circumstances the refusal of the executors was wilful.

Willis Bund, for the executors:—

Ellen Bath, by her affidavit expressly sets up an adverse claim. When there is a dispute of this kind a refusal to surrender cannot be considered wilful.

Levett, in reply:—

Ellen Bath was a party to the action before Vice-Chancellor *Bacon*. There is no evidence that any claim was made by her before this affidavit, and a claim made at that late stage cannot justify the refusal.

COTTON, L.J.:—

In this case a question is raised as to the combined effect of sect. 45 of the *Copyhold Act*, 1887, and sect. 30 of the *Conveyancing and Law of Property Act*, 1881. I feel reluctant to give a decision upon this point, which is by no means clear, unless it is necessary to do so, and it is not necessary unless the case is brought within sect. 2 of the *Trustee Act Extension Act*, 1852. A case is not within that section unless the Court is satisfied that the trustee has wilfully neglected or refused to convey. Now I do not think that a trustee's conduct in not conveying can be considered wilful, if the title of the applicant to call for a conveyance is subject to a dispute which leads the trustee to entertain a *bonâ fide* doubt as to his title. I think that sect. 2 was only intended to apply in clear cases, such as, for instance, where a conveyance to a new trustee as to whose title there is no doubt, is asked for. It is not often that the section is resorted to by a person claiming to be beneficially entitled. Here Miss *Bath*, by her affidavit in support of the petition, states that she reserves her rights under her brother's will, the construction of which had been disputed. Under these circumstances, I am not satisfied that the trustee was guilty of wilful neglect or refusal in declining to convey, and I

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am therefore of opinion that Mr. Justice *North* was right in refusing to make the order.

LINDLEY, L.J.:—

The Court has no jurisdiction to make the order unless there was wilful neglect or refusal, and I am not satisfied that the conduct of the executors was wilful.

BOWEN, L.J.:—

I am of the same opinion. The executors appear to have entertained a *bonâ fide* doubt, and I am of opinion therefore that their refusal was not wilful. Before deciding on the construction of sect. 30 of the *Conveyancing Act of* 1881, and sect. 45 of the *Copyhold Act,* 1887, I should wish to hear a further argument.

Solicitors for the Petitioner: *S. D. Ashby & Compton.*
Solicitors for the Executors: *W. H. Withall & Co.*

H. C. J.

COOPER *v.* STRAKER.

KAY, J.

1888

[1888 C. 35.]

Oct. 29, 30, 31; *Nov.* 1, 10.

Ancient Light—Prescription—User—Window with Shutters occasionally opened—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4 [*Revised Ed. Statutes, vol. vii., p.* 224]—"*Use*" *of Light* "*actually enjoyed.*"

The use of light has been "enjoyed" with a building within the meaning of sect. 3 of the *Prescription Act*, if the owner of the building has had the amenity or advantage of using the access of light. It is not necessary that there should have been a continuous user.

The owner of a building having windows with moveable shutters, which are opened at his pleasure for admission of light, acquires a right to light under sect. 3 of the Act at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if also there is no such interruption of the access of the light over the neighbouring land as is contemplated by sect. 4.

In such a case, if it be proved that the window-openings have remained unchanged for twenty years, and that the shutters were constructed so that they might be opened or closed at the pleasure of the owner of the building, the onus is thrown upon the owner of the neighbouring land to prove that the right has not been acquired.

THE Plaintiffs were the owners of a wool warehouse, seven storeys high, having numerous windows, and situated near *Bishopsgate Street*, in the city of *London*. The whole of the warehouse, except the top storey, was built in the year 1864. The windows in the six lower storeys were alleged by the Plaintiffs to have existed in the same condition since that time.

The Defendants were the owners of land nearly adjoining the Plaintiffs' premises. Previously to the year 1887 the Defendants' land was occupied by buildings of inconsiderable elevation. In that year the Defendants demolished these buildings, and cleared the land for the purpose of erecting thereon a building of loftier elevation.

The Defendants from time to time submitted plans and elevations of their proposed building for the approval of the Plaintiffs. The Plaintiffs declined to give their approval, alleging that the proposed building would obstruct the access of light to their premises.

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The Defendants made proposals for an arbitration, which were declined by the Plaintiffs, who brought this action for an injunction to restrain the Defendants from erecting or building any building or erection on their land in such a manner as to hinder or obstruct the free access of light to the Plaintiffs' premises or the Plaintiffs' enjoyment thereof.

On the action coming on for trial on the 13th of June, 1888, it appeared that the Defendants did not dispute that the windows in question (thirty-one in number) were ancient, but denied that the proposed building would in any way obstruct the access of light to the windows, and further alleged that the user of the windows by the Plaintiffs had been of such a character that they had not thereby acquired a right to light. It was then agreed that it should be referred to two arbitrators and an umpire to determine and report whether the erection by the Defendants of the proposed building would materially diminish for business purposes the light coming to the various windows on the north-west and north-east sides of the Plaintiffs' building other than those on the top floor, and if so, then what building could be erected by the Defendants without so diminishing such light; and for this purpose the action was ordered to stand over generally.

The umpire made a report, from which it appeared that the proposed building would interfere with the access of light to five of the windows, namely, one upon the ground floor, and the windows upon the first and second floors, immediately above it, and also two adjoining windows on the two last-mentioned floors, but would not materially diminish the light to the remaining windows. He also described the sort of building which could be erected by the Defendants without diminishing the light.

The action now again came on for trial, the main question raised for the decision of the Court being, whether the user of these five windows by the Plaintiffs had been such as to confer on them the right to light.

Witnesses were examined on both sides, and from the evidence given by them the following facts appeared:—

The five windows now in question, so far as the window-openings were concerned, had existed in their present condition since

1864. The warehouse had been used during all that period for the storage and sale of wool. The topmost storey was lighted by numerous side windows and also by skylights. The storey next below this was lighted to some extent by the same skylights, and by means of trap-doors underneath them, in the floor of the topmost storey. Four or five times a year there were public sales of wool in the warehouse, which lasted for six weeks at one period of the year, and shorter times at the other sales, the shortest being about a fortnight. Before these sales samples were taken from the bales to be sold, and the selling broker determined the mode of lotting out the wool. It was then the duty of the persons employed at the warehouse to arrange the bales in lots determined on by the broker, and some examination of the wool was necessary for this purpose to see that all the bales in each lot were up to sample. When the bales had been so lotted they were shewn, that is, submitted to the inspection of buyers or intending buyers. For this purpose daylight was essential, and buyers were very particular about having the best light that could be obtained. The shewing always took place, if possible, in the top storey, or, if the quantity lotted were too much, then in that storey and the one immediately below it. But it had happened, not unfrequently, that shewing had also taken place upon all the floors, down to and including the floor next above the ground floor. The true result of the evidence, in the opinion of the Court, was that this most frequently took place on the topmost floor, and less and less frequently on each lower floor, least of all on the first floor, and not at all on the ground floor.

Besides these public sales, private sales were continually going on, and the shewing for these took place wherever it could conveniently be done, and sometimes, in the case of mohair and what were called low wools, which term was understood to mean wools of coarse fibre, even on the ground flour.

The five windows in question and most of the other windows in the building had shutters of sheet-iron, like folding doors, hinged to the outside of the window-openings, which shutters, when closed, would completely exclude the access of light to the windows. These shutters on the three lower floors were kept

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shut, except when the business of the warehouse required them to be opened. Each floor had loop-holed doors for taking in bales by the aid of cranes, and in these doors were glass windows, considerably smaller than the proper windows of the building, but they were not closed by shutters. Bales were usually stored in the ground, first, and second floors of the building by piling them up in every available place, including the space in front of the window-openings inside the rooms; but they were continually being moved for the purpose of the sales, and when they happened not to be in front of a window the shutters of that window would be opened to admit light for any work that might be going on near it. There was the positive evidence of persons employed in the building that this was the case as to all the five windows, and in the opinion of the Court the true result of that evidence was that the shutters of all these windows were occasionally opened for the purpose of admitting light to the several rooms, that this occurred very seldom to the windows on the ground floor, more frequently on the first floor, and still more often on the second floor, and that with respect to all these five windows the shutters were more generally closed than opened.

His Lordship having held that under the circumstances the onus lay upon the Defendants to prove that the Plaintiffs had not acquired the right to light in respect of the five windows, the counsel for the Defendants were called upon to argue first.

Jelf, Q.C., *Renshaw*, Q.C., and *Haldane*, for the Defendants:—

There has been no such enjoyment by the Plaintiffs of the use of the light to these windows as will confer on them a right to light under sect. 3 of the *Prescription Act*. In order to bring a case within that section there must be "actual enjoyment" of two things, first, the "access" of light coming over the servient tenement—see *Scott* v. *Pape* (1)—and secondly, the "use" of the light by the owner of the dominant tenement in and for that tenement. The iron shutters, external to the windows when closed, entirely prevented the access of light, and the evidence shews that they were only occasionally, and in the case of the ground floor very seldom, if ever, opened for the purpose of

(1) 31 Ch. D. 554.

admitting light. In *Harris* v. *De Pinna* (1), where timber was so piled up in the dominant tenement as generally to block the access of light, which was only admitted from time to time, it was held that there had been no sufficient enjoyment within the statute.

[KAY, J.:—That case turned upon the fact that there was no definite opening which gave the owner of the servient tenement notice that it was intended to light the building.]

In *Courtauld* v. *Legh* (2), *Channell*, B., distinguished the case of a house having windows "with iron shutters fixed behind them" from that of a house with "ordinary windows" sufficient to satisfy the words of the statute as to enjoyment.

[KAY, J.:—The essential word there is "fixed."]

The enjoyment of the use must be actual, not partial. The use must be of such a character and extent as will intimate to any reasonable person, owner of the adjoining land, that the light is being enjoyed.

[They referred also to *Martin* v. *Goble* (3); *Lawrence* v. *Obee* (4); *Moore* v. *Rawson* (5); and *Stokoe* v. *Singers* (6).]

Marten, Q.C., Sir *Horace Davey*, Q.C., and *F. M. Abrahams*, for the Plaintiffs:—

Sect. 3 of the *Prescription Act* is satisfied if there has been such a use of the light by the Plaintiffs as they required for their own purposes. The Act does not, nor could it, contemplate a "continuous" user. The user must necessarily be relative to the character of the particular house, building, or room in which the light is used. No doubt there must be a user by some definite opening, in the nature of a window, admitting light to the "dwelling-house, workshop or other building;" but the use is enjoyed if there are windows capable of being opened and shut and admitting light—*Courtauld* v. *Legh* (7)—which are used when required; and the *quantum* and mode of enjoyment are

(1) 33 Ch. D. 238.
(2) Law Rep. 4 Ex. 126, 129.
(3) 1 Camp. 320.
(4) 3 Camp. 514.
(5) 3 B. & C. 332.
(6) 8 E. & B. 31.
(7) Law Rep. 4 Ex. 126.

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immaterial: *Yates* v. *Jack* (1); *Aynsley* v. *Glover* (2). All that is necessary is that the enjoyment should have been "without interruption," that is, as explained by sect. 4, interruption by the owner of the adjacent tenement acquiesced in for the full period of a year: *Flight* v. *Thomas* (3); *Hollins* v. *Verney* (4). There is no evidence of any such interruption, or of any abandonment of their right by the Plaintiffs, and the utmost that is proved is that the shutters were only opened occasionally in each year. But if 364 days' interruption in each year will not deprive a man of his right to light it follows *à fortiori* that interruption and non-user for a certain number of days in the year will not do so. On the other hand, the evidence is clear that the Plaintiffs have used all these five windows whenever they required to use them.

Jelf, in reply, referred to *Clarke* v. *Clark* (5).

1888. Nov. 10. KAY, J.:—

This case raises a question which has often been discussed in actions concerning light and air, namely, what amount of user is requisite to entitle the owner of a building at the end of twenty years to the right of receiving the light which passes over his neighbour's land to the windows of that building. [His Lordship stated the facts of the case as appearing from the evidence of the witnesses and continued:—]

The claim of the Plaintiffs is rested on sect. 3 of 2 & 3 Will. 4, c. 71, which enacts that "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible."

The section requires that two things shall have been enjoyed; "access," which, I think, means over the neighbour's land; and "use," which must be the use of light so coming by the person who claims the right conferred by the statute.

Both that access and use must have been actually enjoyed with

(1) Law Rep. 1 Ch. 295.
(2) Ibid. 18 Eq. 544.
(3) 8 Cl. & F. 231.
(4) 13 Q. B. D. 304.
(5) Law Rep. 1 Ch. 16.

the house and for the full period of twenty years without interruption. It was decided in *Flight* v. *Thomas* (1) that the interruption there meant is explained by sect. 4 to be an interruption by the owner of the neighbouring land acquiesced in for a year. No such interruption has occurred in this case. It is not suggested that the Plaintiffs have abandoned their right, as in *Moore* v. *Rawson* (2), where the owner of the house, it was held, had done so, by pulling the house down, and building on its site a stable having a blank wall which existed about fourteen years without any windows. But the argument is that the Plaintiffs have not enjoyed the use of light to these windows, or at any rate to the ground-floor window, within the meaning of the statute. That depends upon the signification of the words "actually enjoyed." Enjoying the use cannot mean shall have continuously used. If that had been the intention of the statute some such word as "continuously" should be found in this section, and it might then be necessary to shew that the Plaintiffs had never closed their shutters for a day during twenty years next before the action.

I take "enjoyed" to mean "having had the amenity or advantage of using" the access of light; that is nearly equivalent to "having had the use," the intention being that the owner of a house may acquire the right to have the access of light over adjoining land to an opening which he has used in such manner as suited his convenience for the passage of light during twenty years.

The cases which touch this question most nearly seem to be *Yates* v. *Jack* (3), in which Lord *Cranworth* decided that the right conferred by the statute is an absolute, indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used. This was concurred in by Lord *Chelmsford* in *Calcraft* v. *Thompson* (4). In *Courtauld* v. *Legh* (5) it was decided that the right was acquired for a house which was completely built and had windows in it, though it was not internally finished, and had not been inhabited except for a portion

(1) 8 Cl. & F. 231.
(2) 3 B. & C. 332.
(3) Law Rep. 1 Ch. 295.
(4) 15 W. R. 387.
(5) Law Rep. 4 Ex. 126.

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of the twenty years before action brought. It was held that this was an enjoyment by the owner of the use of the light; one of the learned judges saying that this view met the justice of the case, because the intention to use the windows was unmistakeably indicated. Baron *Cleasby* (1) says that the fallacy of the defendant's arguments was "in assuming, that for actual enjoyment of light, the party having it must take all the benefit which he could derive from its use." *Channell*, B. (2), intimates that there might be an exception in the case of "windows with iron shutters fixed behind them," but the essential word in that sentence is "fixed," which obviously means either shutters that will not open, or shutters that are never, in fact, opened during the twenty years.

It was argued that such a use as was made of the windows in this case would not intimate to the owner of the adjoining land that light was being enjoyed. I do not agree with this argument. If it be essential that the light should be so enjoyed as to give him notice, the window-openings in this case were formed in 1864, the shutters were moveable, they were opened from time to time, and he must have been extraordinarily negligent or indifferent if he did not from these facts understand that a right might be gained.

I asked counsel how often the shutters must be opened during the twenty years to give the right conferred by the statute. The answer was, a reasonable number of times. That would be to determine an uncertain thing by something still more uncertain. The owner of the dominant tenement might well say, "My use has been reasonable. This is my mode of enjoying the light. You might have stopped it if you pleased at any time within twenty years."

I am of opinion that in the case of windows with moveable shutters, which are opened at the owner's pleasure for admission of light, the right is gained at the end of twenty years, if he opens them at any time he pleases for the admission of light during those twenty years, and there is no such interruption of access over the neighbouring land as is contemplated by sect. 4. In such a case, it being proved that the window-openings have

(1) Law Rep. 4 Ex. 130. (2) Law Rep. 4 Ex. 129.

remained unchanged for twenty years, and that the shutters were constructed so that they might be opened or closed at the pleasure of the owner, in my opinion the onus is thrown upon the owner of the neighbouring land to prove that the right has not been gained. In this case he has not proved this. I think that under the circumstances the Plaintiffs have acquired an absolute right to the light coming to their ancient windows over the Defendants' land, as it has come during the twenty years next before this action, just as though those windows had been open for the admission of light during all that time.

By consent of both parties the matter was referred at the trial to two arbitrators and an umpire, who were to inquire whether the proposed building was proper, and if not, to determine what sort of building the Defendants might erect. The umpire has made a report, the effect of which is that the building proposed to be erected by the Defendants, according to the last plans submitted by them to the Plaintiffs, would have interfered too much with the access of light to the windows in question, and he has described the building which the Defendants ought to erect. The Defendants, before the trial, suggested an arbitration, which was not agreed to, and on that ground they now urge that costs should not be given against them. If they submitted to the finding of the arbitrators or umpire, there would be some reason in this. But they do not submit to the award which has been made, and have raised questions of law which, if they had succeeded, would have defeated the findings of the umpire.

I must now grant a perpetual injunction to restrain them from erecting any building upon this land which will interfere with the light coming to the Plaintiffs' ancient windows more than the building recommended by the umpire.

The Defendants have been wrong throughout, and must pay the costs of the action and reference.

Solicitors for Plaintiffs: *Michael Abrahams, Sons, & Co.*
Solicitor for Defendants: *J. W. Sykes.*

C. C. M. D.

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1888
Nov. 12.

In re MORRIESON.
HITCHINS *v.* MORRIESON.

[1888 M. 2433.]

Will—Construction—Wife—Life Interest to future Wife of Legatee—Divorce.

A testator bequeathed a share of his residuary personal estate in trust for his son for life, and after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again:—

Held, that the woman was not entitled to the income of the son's share.

Bullmore v. *Wynter* (1) observed upon.

Adjourned summons.

David B. Morrieson, who died on the 11th of October, 1864, by his will, dated the 2nd of May, 1864, gave his residuary personal estate to trustees upon trust for his sons *David W. Morrieson*, *Edward C. Morrieson*, *Henry W. Morrieson*, and *Duncan H. Morrieson*, and his daughters *Fanny S. Morrieson* and *Amy C. Morrieson*, in equal shares or proportions as tenants in common during their respective lives, and from and after the decease of each such son as to his share and of each such daughter as to her share "in trust to pay unto or permit or suffer any wife or husband (as the case may be) of such son or daughter to receive the annual income of his or her share during the life of such wife or husband, and subject as aforesaid as to the capital of each such share" upon certain trusts under which, in default of issue of a deceased son, the income of his share became divisible among the surviving sons and daughters of the testator during their respective lives.

On the 14th of September, 1882, *Duncan H. Morrieson* married the Defendant *Ada Mary Morrieson*. On the 20th of December, 1887, on the petition of *Duncan H. Morrieson*, a decree for the dissolution of his marriage with the Defendant *Ada Mary Morrieson* was made absolute.

Duncan H. Morrieson never married again, and never had any issue. He died on the 23rd of May, 1888.

(1) 22 Ch. D. 619.

This was an originating summons, taken out by the trustees of the will, to have it determined whether the income of the share of the testator's estate to which *Duncan H. Morrieson* was entitled for his life was now payable to the Defendant *Ada Mary Morrieson* during her life, or among the surviving sons and daughters of the testator.

It appeared that the income of the share in question was about £600 per annum.

A. J. Spencer, for the Plaintiffs, stated that this application was made to the Court in consequence of the difficulty caused by the decision of Mr. Justice *Fry* in *Bullmore* v. *Wynter* (1).

Vernon Smith, for the Defendant *Ada Mary Morrieson*, contended that she was entitled to a life interest in the share in question, and relied on *Bullmore* v. *Wynter*, which, he argued, was not distinguishable in principle from the present case.

Millar, Q.C., and *Willis Bund*, for other Defendants, daughters of the testator, were not called upon.

KAY, J. :—

I confess that I have not a moment's hesitation about this case. [His Lordship stated the terms of the gift, and continued :—] One of the testator's sons was married. He presented a petition for a divorce from his wife, and an absolute divorce was granted. Subsequently he died without having married again. The divorced wife now says, "I was the wife of this son, and I claim a life interest in this property under this provision." Now, the life interest was evidently meant for a widow or widower; the will says "wife or husband," but the life interest is to commence at the death of the son, and therefore the will does not mean any wife the son might marry; he might marry a wife who died in his lifetime, and after her death he might marry again; he might marry again two or three times; but none of these wives could possibly have any interest unless she were at the moment of his death in the *status* and position of a wife. At the moment of the

(1) 22 Ch. D. 619.

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death there was no such person. This lady, who had been his wife, was no longer his wife. He might have married again, and left a widow, who would unquestionably have been entitled to a life interest in this property at his death. That is not a contingency which can be disregarded; it is a mode of construing the will. The question is, to whom this interest is given? Is it given to a person who was at one time his wife, but at the time of his death was so no longer, or to a person who then could say, "I was the wife and am now the widow?" In my opinion, it is clearly a gift to the latter.

I am referred to a case of *Bullmore* v. *Wynter* (1), which I certainly should not myself have decided as it seems to have been decided, but in which the circumstances were very analogous to those of the present case. In that case there was a gift to the testator's daughter by name during her life for her separate use without power of anticipation, "and after the death of his said daughter in trust for any husband with whom she might intermarry, if he should survive her, for his life." She did marry, and her husband petitioned for a divorce, and an absolute decree was made for the dissolution of the marriage. Then she died, and Mr. Justice *Fry* held that the husband was entitled to the property for his life. I must say with all respect I do not understand the reason of that decision, and if the case had come before me I should have decided it the other way. I am not bound by that case unless the words of that will and the facts were identical with those in the present case. I cannot help supposing that the learned Judge was influenced by the circumstance that there the husband was the petitioner, and the wife from whom he was divorced was the guilty party, and that the Judge considered it hard on the husband that he should lose the property because of the guilt of his wife. Whether that was the moving cause or not, I do not know. I observe, however, that it was brought clearly before the Judge's mind that the wife might have married again and left a husband, who, by the law of *England*, would be her husband at the time of her death, and that that husband might have claimed the property, and the mode in which the learned Judge dealt with that suggestion was as

(1) 22 Ch. D. 619.

follows (1): "A difficulty which might arise from this view has certainly occurred to me. It is obvious that the same wife might have married a husband, or husbands, from whom she might have been divorced, and who might survive her, and that a husband might also survive her from whom she had not been divorced, in which case there would then be more than one surviving husband, each of whom would satisfy the words of the will. But it does not seem to be right to give so much weight to the possibility of such a contingency as to overrule what appears, in my opinion, to be the plain meaning of the will."

If I had to choose between the two persons, the law of *England* would only permit me to come to one conclusion, namely, that the husband from whom she had been divorced was not the husband entitled under the gift. The husband whom she subsequently married would be by the law of this country her husband at the time of her death. There seems to me to be no answer to that argument. If so, it clearly follows that the husband who had been divorced was not the person entitled. The contingency was not merely one which had to be regarded in construing the will, but was a mode of shewing that the person who made the claim in that case was not the husband at the time when the wife died, and, therefore, could not be entitled.

I cannot, therefore, feel bound to follow that decision, neither the words of the gift nor the facts in this case are identical with those in that case, and, so far as my own opinion is concerned, I decide, without hesitation, that this lady is not entitled to a life interest in the share of the deceased son of the testator.

Solicitors: *Booty & Bayliffe; H. J. Skinner.*

(1) 22 Ch. D. 620.

C. C. M. D.

CHITTY, J.

1888
Oct. 30.

In re THACKWRAY AND YOUNG'S CONTRACT.

Railway Company—Sale of superfluous Land—Absolute Sale—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 127 [*Revised Ed. Statutes, vol. ix., p.* 660].

A railway company on the 12th of July, 1867, conveyed certain superfluous lands, the period for the sale of which under their special Act expired on the 13th of July, 1867, and the conveyance contained a covenant by the purchasers that they would pay the purchase-money on or before the 12th of July, 1869, with interest in the meantime; and by an indenture of even date and made between the same parties, it was declared that until the whole of the purchase-money and interest were paid the company should have a lien on the deed of conveyance and the lands therein comprised:—

Held, upon a summons under the *Vendor and Purchaser Act*, 1874, raising the question whether sect. 127 of the *Lands Clauses Act*, 1845, had been satisfied, that, having regard to expressions in the judgments of the Court of Appeal in *London and South Western Railway Company* v. *Gomm* (1) to the effect that when land is sold as superfluous no interest in it can be retained by the company, the question was one of such doubt that it must be left open and not answered in a way which would force the title on a purchaser or prejudice the vendor's title.

By two special Acts of Parliament passed in 1844, the *York and North Midland Railway Company* were authorized to acquire lands, and were required to sell such of them as should be superfluous within ten years after the passing of the respective Acts.

By the *York and North Midland Railway* (*Harrogate Section*) *Act*, 1847, the company were authorized to acquire certain lands including lands situate at *Harrogate*, comprised in the agreement hereinafter stated, and it was enacted that the provisions of the two special Acts above stated, except such of them as were inconsistent with the *Lands Clauses Act*, 1845, should extend to the Act now in statement, and that the said Acts and the Act now in statement should be construed and read together as one Act, and that so much of the *Lands Clauses Act*, 1845, as was applicable to and not modified by the Act now in statement or inconsistent with its provisions should be read and construed as forming part of the Act now in statement.

(1) 20 Ch. D. 562.

By a deed-poll dated the 23rd of January, 1851, the above-mentioned lands became vested in the company under the statutory powers conferred by the last-mentioned Act.

By another special Act passed in 1849, the period within which the company was required to sell such of its lands as were superfluous was extended by five years.

In 1854 the company was by a special Act dissolved, and all its rights and liabilities in respect of the said lands were thereby vested in the *North-Eastern Railway Company*.

By the *North-Eastern Railway Company* (*Lanchester Valley Branch*) *Act*, 1857, and to which the Royal assent was given on the 13th of July, 1857, the period limited for the sale of such lands as were taken under the powers of the above-mentioned special Act of 1847, and as should become superfluous, was extended to ten years from the passing of the Act now in statement.

By an indenture dated the 12th of July, 1867, and made between the *North-Eastern Railway Company* of the one part, and *Charles Thackwray* and others of the other part, after reciting an agreement that the company should convey the said lands to the persons, parties thereto of the second part forthwith, but that the payment of the purchase-money should be postponed and should be secured with interest thereon by the deposit with the company of the indenture now in statement as an escrow or by way of equitable mortgage, and by the covenant of the purchasers in manner thereinafter expressed, it was witnessed that in pursuance of the said agreement and in consideration of the sum of £13,500 secured to be paid to the company by such deposit as above-mentioned, and by the covenant thereinafter contained, the company conveyed the said lands with other lands to the purchasers, their heirs and assigns, as tenants in common in equal shares. The said indenture also contained a covenant by the purchasers that they or their representatives would on or before the 12th of July, 1869, pay to the company the said purchase-money of £13,500, and in the meantime interest at 4 per cent., and if after the last-mentioned date the said purchase-money remained unpaid interest as therein mentioned.

By an indenture of even date with and made between the same

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parties as, but executed after, the last-mentioned indenture, it was declared that until the whole of the purchase-money of £13,500 and interest were paid the company should have a lien on the last-stated indenture and the lands therein comprised, but subject to certain provisions whereby the purchasers, their heirs and assigns were empowered, notwithstanding that the purchase-money or any part thereof might remain unpaid, to sell the lands or any part thereof, the purchase-moneys to be received upon any such sale as aforesaid, being paid to the company in part satisfaction of the £13,500, and the company's lien on the portion sold thereupon ceasing, and the purchasers were also empowered to pay the whole or any part of the £13,500 at any time prior to the 12th of July, 1869, or as they might think fit.

Some years later the purchase-money with interest was paid.

By an agreement dated the 11th of June, 1886, the said *Charles Thackwray* agreed to sell, and *William Young* and others agreed to purchase the said lands at the price of £11,000, and provisions were therein contained for the delivery by *Thackwray* of an abstract of title, and for the statement by *Young* and the other purchasers of their objections and requisitions.

Among other objections to the title it was objected that such an absolute sale and conveyance of the land as required by the *Lands Clauses Consolidation Act*, 1845, was not made by the railway company before the 13th of July, 1867, the period limited by the several above-mentioned Acts for the sale of superfluous lands.

Ultimately a summons was taken out under the *Vendor and Purchaser Act*, 1874, by the purchaser asking for a declaration that the above objection had not been sufficiently answered, and that a good title to the lands had not been shewn, and that the purchasers were entitled to be discharged from their contract.

Romer, Q.C., and *Osler*, for the summons :—

The sale by the railway company was not such an absolute sale and disposition of the lands as is required by sect. 127 of the *Lands Clauses Act*, 1845. The company retained an interest in the lands, and when lands are sold by a railway company as superfluous lands no interest in them can be retained by the

company: *London and South Western Railway Company* v. *Gomm* (1).

Whitcombe, for the vendors:—

The deed of conveyance of the 12th of July, 1867, operated as an absolute sale. The deed of even date could not alter the effect of the other deed.

[He referred to *Tennant* v. *Trenchard* (2).]

Romer, in reply, referred to *Backhouse* v. *Charlton* (3); *James* v. *James* (4), and *Davey* v. *Durrant* (5).

CHITTY, J.:—

In this case the purchaser objects to the title on the ground that the transaction disclosed on the face of the deeds of the 12th of July, 1867, relating to the lands comprised in the contract, is a transaction which did not amount to an absolute sale and disposal of lands which were then the superfluous lands of the railway company within the meaning of the 127th section of the *Lands Clauses Consolidation Act*, 1845, and the purchaser's counsel says that having regard to the decision of the Court of Appeal in the case of the *London and South-Western Railway Company* v. *Gomm* the question is one of such doubt that the Court ought not to force the title on the purchaser. Now the language of the section is that the promoters shall absolutely sell and dispose of the superfluous lands within the time limited, and in regard to this company the time limited expired the day after the deeds in question. The section requires that there shall be an absolute sale and disposition of the lands. It does not say in terms that the sale must be completed before the expiration of the period by payment of the purchase-money on the one hand and conveyance on the other. Now where a contract for sale is entered into and the terms of the contract are that the sale shall be completed by a particular day, and that day falls within the period named, it may be said with a considerable

(1) 20 Ch. D. 562.
(2) Law Rep. 4 Ch. 537.
(3) 8 Ch. D. 444.
(4) Law Rep. 16 Eq. 153.
(5) 1 De G. & J. 535.

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degree of force that that is an absolute sale and disposition of the lands within the meaning of the section, and that to import anything into the 127th section beyond what is found there is to add to the legislation and in effect to lay a greater burden on the company than the Legislature intended. The transaction here as disclosed by the two deeds may for the purpose of my decision be shortly stated thus. It was a sale: the deeds shew that clearly. It was a sale that was to be completed and was completed in point of fact in all respects before the expiration of the period, namely, it was carried into effect completely on the 12th of July, 1867, except in one particular, and that was the payment of the purchase-money. By the terms of this contract for sale there was a condition that the purchase-money should not be paid, or that it should not be payable for a period of two years afterwards. At the same time the transaction cannot be impeached on the ground that it was a sham, or that the persons who appear on the face of the deeds as purchasers were agents of the company, or anything of that kind. The transaction is openly stated and disclosed on the face of the deeds. But, as is well known, where there is a contract for sale which is valid and can be specifically performed the equitable interest in the lands at once passes to the purchaser subject to his payment of the money, and, on the other hand, the vendor has a lien on the land for the unpaid purchase-money. That is the law, and it is scarcely necessary to refer to *Shaw* v. *Foster* (1) for that proposition. Then, in this case, some years after the time limited for the payment of the purchase-money the purchase-money was in fact paid. The question which I am asked to decide is whether the transaction was an absolute sale and disposition of the lands within the meaning of the section. I take it as a general principle of law with regard to specific performance, that the Court does decide on general matters of law about which there cannot be fairly said to be any judicial doubt. In regard to this question, which of late years has undergone a good deal of consideration as to titles which the Court will or will not force upon a purchaser, it has been laid down by *James*, L.J., in *Alexander* v. *Mills* (2), that with regard

(1) Law Rep. 5 H. L. 321. (2) Law Rep. 6 Ch. 124, 131.

to general matters of law, including the construction of a general Act of Parliament, the right course for the Court is to decide the question. But then I think it must appear to the Judge who decides it that there are no decisions or *dicta* of weight which shew that another Judge or another Court having the question before it might come to a different conclusion. The Court, I take it, must feel such confidence in its own opinion as to be satisfied that another Court would not adopt another conclusion. Now I will refer to the case that has been mentioned in the course of the argument, *London and South Western Railway Company* v. *Gomm* (1), and I will proceed to state very shortly what that case was. Upon the case itself it appears to me there could be little doubt. There the railway company had sold, but according to the terms of the contract they had a right of repurchase. The Court of Appeal held that that was not an absolute sale but a conditional sale. That of course is not this case. But in giving his decision Sir *George Jessel* laid down a principle which, although it was not perhaps necessary for that decision, yet states clearly his own opinion, and he bases it on these grounds (2): "It is plain that when land is sold as superfluous, no interest in it can be retained by the company. Now if I am right in the conclusion at which I have arrived as to the nature of this option of repurchase an interest was retained by the company." (Upon that minor proposition I should say there can be no doubt.) "The form of the conveyance is plain. It recites a contract for sale subject to the condition thereinafter mentioned. That is not an absolute sale but a conditional sale. Now the statute in terms requires an absolute sale, and that being so, the company could not sell, reserving an option of repurchase. The sale itself therefore was beyond their power, and was a void sale, and we must recollect that this is a statute which governs the legal estate as much as the equitable estate." Sir *James Hannen* in giving his decision says in general terms that the word "absolutely" was inserted in the section, in his opinion, "in order to prevent the company having acquired lands which it was found afterwards were not required for the purpose of the undertaking, from still retaining indirectly a hold upon those lands." Now it

(1) 20 Ch. D. 562. (2) 20 Ch. D. 584, 585.

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is quite plain, without going into any questions of details with regard to the two deeds, that the company here did retain an interest in the land. Whether they could have obtained foreclosure or could have obtained sale, it is clear that they had an interest; indeed, as I have said during the course of the argument, and as I have said in this judgment already, if the transaction of sale is not complete by conveyance and payment of purchase-money in every case, the vendor has quite apart from what the contract discloses an interest in the land. Now having regard to what fell from Sir *George Jessel* in the case I have referred to, that no interest can be retained by the company, and in substance by Sir *James Hannen* that the company cannot indirectly have a hold on the land, and having regard to what Sir *George Jessel* said, that the statute governs the legal estate as much as the equitable, it seems to me I cannot say, whatever might have been my opinion if I were construing the section for the first time, that I have such confidence in it that I can hold that this would be the unmistakeable result of any litigation between the parties who might be claiming under the statute, namely, that there was an absolute sale. I do not think it right to express any personal opinion on the matter beyond this, to point out that it can be urged as against this transaction that the sale was not absolute because it was one of the conditions of the contract itself that the purchase-money should be paid at a later date, the section requiring, according to its express terms, that there should be an absolute sale. I intend by this judgment to leave the question of construction entirely open, and not in any way to prejudice the vendor's title, beyond saying that I think I cannot hold as against the purchaser that he is forced to take this title; the state of the law as disclosed by the decision to which I have referred, and the *dicta* of eminent Judges having placed the question, although it be a question of construction of a general Act of Parliament, in such a position that I cannot with that certainty which is required of me say that no other Court would come to a different conclusion.

Solicitors: *Field, Roscoe, & Co.; William Stubbs*, agent for *Hirst & Capes, Harrogate.*

G. M.

NORTH, J.
1888
Oct. 25.

In re COTTON.
WOOD *v.* COTTON.

[1888 C. 1151.]

Will—Construction—Special Power of Appointment.

A testatrix devised, bequeathed, and appointed her residuary estate, including all property over which she should have at her death a power of appointment, on trust, after payment thereout of debts, testamentary and funeral expenses, to apply so much as the trustees should think fit of the income during the minority and spinsterhood of her only child, a daughter, for her maintenance and to accumulate the surplus, and on the daughter attaining twenty-one or marrying the whole to her for life, with remainders over. The testatrix had a power of appointment among her children over property settled in default of appointment on such children at twenty-one or marriage:—

Held, that the power was not executed.

Observations on *In re Swinburne* (1).

THIS was an originating summons to determine questions upon the will of *Mary Martha Eastwood Cotton*, widow, who died in September, 1881, having made her will shortly before her death. Under her marriage settlement the testatrix had a power of appointment by deed or will among the children of her marriage, over property settled, in default of appointment, among such of the children of the marriage as being sons should attain twenty-one and being daughters should attain that age or marry. There were only two children of the marriage, a son, who died under age before the date of the will, and a daughter, *Elizabeth Martha Wood Cotton*.

The testatrix's will contained the following disposition: "I give, devise, and appoint all my real and personal estate whatsoever and wheresoever, and all other the real and personal estate of or to which I shall at my death be seised or possessed, or over which I shall at my death have a power of appointment or disposition by will, unto my trustees upon trust, at their discretion, and subject to the power of postponement hereinafter contained, to call in and sell and convert the same into money, and after

(1) 27 Ch. D. 696.

NORTH, J.
1888
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payment thereout of my debts and funeral and testamentary expenses to stand possessed of the net proceeds of such sale and conversion and of my ready money upon trust to invest the same, and during the minority and spinsterhood of my daughter, *Elizabeth Martha Wood Cotton*, to pay to her or apply for her maintenance and education such part of the income and profits of my trust estate as my trustees may in their discretion think proper, and to accumulate the residue of such income, and such accumulations shall from time to time as and when they arise be added to and form part of my trust estate."

The testatrix gave her daughter upon attaining twenty-one or marrying a life interest in the trust estate, and declared trusts in remainder for the benefit of the issue of the daughter, with remainder over in default of issue.

The Plaintiffs to the summons were the trustees of the will. The Defendants were the testatrix's daughter and other beneficiaries under the will. The testatrix's daughter had not married, she was an infant when the testatrix died, and had recently attained the age of twenty-one years.

One question for the decision of the Court was, whether the Defendant, *Elizabeth Martha Wood Cotton*, was bound as regards such portion, if any, of the property comprised in the settlement as was disposed of under the will to elect whether she would take under the provisions of the will or under the provisions of the settlement.

C. C. M. Dale, for the trustees.

Waggett, for persons interested in remainder under the will:—

Words in a gift of residuary estate generally purporting to be made in exercise of all powers will be taken to be an exercise of a special power: *In re Teape's Trusts* (1). The difficulty, if any, that some of the trusts are not applicable to the property appointed (such as the direction for payment of debts) is got over by reading those trusts as only operative so far as applicable: *In re Swinburne* (2), a case very similar to the present.

(1) Law Rep. 16 Eq. 442. (2) 27 Ch. D. 696.

Cozens-Hardy, Q.C., and *Dunning*, for the daughter of the testatrix :—

In the absence of authority it would be clear that the testatrix could not have intended in a gift containing so much that is inapplicable to property under the settlement to exercise the power, such an exercise being not only beyond the power but void for remoteness. If necessary to distinguish the case from *In re Swinburne* (1), the mode of dealing with the trust estate here is still more inapplicable to the settled funds than it was in that case. Some of the grounds of the decision in *Ames* v. *Cadogan* (2) are an authority in our favour.

Gent, for parties not interested in this point :—

I ought to call your Lordship's attention to the more recent case of *Von Brockdorff* v. *Malcolm* (3), a case of this class, in which Mr. Justice *Pearson* held that a power had been exercised.

Waggett, in reply.

NORTH, J. :—

I am of opinion that this is not a case of election. The limitation in the settlement is in favour of such children of the marriage as the parents might appoint, and in default of appointment to the children. There was only one child. I do not for a moment suggest that that fact of there being only one child puts an end to the power: but the power of exercising it usefully is, beyond all doubt, very much curtailed.

The testatrix when she made her will proceeded in this way: "I give, devise, and appoint all my real and personal estate whatsoever and wheresoever, and all other the real and personal estate of or to which I shall at my death be seised or possessed, or over which I shall at my death have a power of appointment or disposition by will, to my trustees." I confess that in the absence of the authority cited, *In re Swinburne*, I should have doubted whether that was sufficient to shew an intention to exercise the power. Then there comes a direction with regard to the whole

(1) 27 Ch. D. 696. (2) 12 Ch. D. 868.
(3) 30 Ch. D. 172.

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In re COTTON. WOOD *v.* COTTON.

fund to sell and convert into money—which was not applicable, excepting possibly to a limited extent—"and after payment thereout of my debts and funeral and testamentary expenses." In the absence of that authority I should have been disposed to say that a direction for payment of debts shewed that the gift could not be intended to apply to property over which she had a special power. Then the testatrix goes on to direct her trustees to stand possessed of the net proceeds upon trust to invest, and during the minority of the daughter to apply the income for her benefit. Now that was a power that could not be exercised by the trustees of her will during the minority, for the fund was vested in the trustees of the settlement, in trust, no doubt, for the only child if she attained a vested interest, but if she did not then in trust for other persons over whom the testatrix had no control. It is clear, therefore, that here the testatrix is contemplating that the whole of the trust estate she is dealing with will be held by the trustees of her will at a time at which the settled property could not be held and applied by them to the maintenance of the daughter. This shews that she was not intending to exercise the power contained in the settlement. In the case of *Von Brockdorff* v. *Malcolm* (1) Mr. Justice *Pearson* says, near the beginning of his judgment (2): "The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard to the intention of a man of whose intention you know nothing except what you find in his will." I adopt that entirely here; and I think there is quite sufficient in the clause I have last commented upon to distinguish this from the case of *In re Swinburne* (3). I do not think that *In re Teape's Trusts* (4) gives me any assistance, because

(1) 30 Ch. D. 172.
(2) Ibid. 179.
(3) 27 Ch. D. 696.
(4) Law Rep. 16 Eq. 442.

there the testator begins by a direction separate from the rest of the will that his debts and funeral expenses are to be paid, and only afterwards gives the property belonging to him, or over which he might have a power of disposition, at his death to his wife. There was therefore clearly a disposition sufficient to include the life interest over which the testator had a power: and the testator's intention, as the Lord Chancellor points out, was that the debts and funeral expenses were to be paid out of the testator's own property. I come therefore to the conclusion that there is nothing in this will to put the daughter to elect.

Solicitors for all Parties: *Jaques & Co.*, agents for *Hall & White, Huddersfield.*

D. P.

In re CHIFFERIEL. CHIFFERIEL *v.* WATSON.

[1883 C. 3155.]

Vendor and Purchaser—Condition of Sale—Misdescription—Measure of Compensation.

Land was sold under a condition that in case of misdescription compensation should be paid. A road over the land was described in the particulars as "made up." The Court held there was a misdescription as to the extent to which the road was made up:—

Held, that the measure of compensation to the purchaser was not the sum it would cost to make up the road to the extent represented; but the difference between the value of the property as it existed at the time of purchase and the value it would have had if the road had been "made up."

THIS was a summons taken out in an administration action by *William John Bennett*, the purchaser of land, sold under the direction of the Court by trustees, the Defendants in the action, at the price of £1500. The summons asked for a declaration that the Applicant was entitled to compensation in consequence of the road shewn in the plan attached to the particulars of sale under which he bought, not having been "made up" in accordance with statements contained in such particulars, and that the amount of such compensation might be determined by the Judge.

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The contract was signed on the 6th of August, 1887. The sale was made under particulars and conditions of sale prepared for a public auction which had taken place shortly before, when the property in question, one of three lots described in the particulars, was not sold.

The 10th condition of sale was, "If any error or mis-statement shall appear to have been made in the particulars of sale or these conditions such error or mis-statement is not to annul the sale or entitle the purchaser to be discharged from his purchase, but a compensation is to be made to or by the purchaser as the case may be, and the amount of such compensation is to be settled by the said Judge in Chambers."

In the particulars of sale the lot in question was described as "about 21A. 1R. 21P. of building or accommodation pasture land situate at *Worcester Park*, in the parish of *Cuddington, Surrey*, and approached by *Cuddington Avenue*, a new road (made up and sewered) which is continued across the land, thus having considerable frontages for building purposes and affording numerous sites for the erection of residences." There was a plan attached to the particulars on which *Cuddington Avenue* and the lot in question were delineated, and a road was marked in dotted lines across the property in continuation of *Cuddington Avenue*. *Cuddington Avenue* was laid out for two footpaths. It had been sewered. The roadway had been gravelled over a foundation of chalk; one footpath had been constructed and the other had not. The road marked on the plan across the property in question was about 350 yards long. A very small portion had not been made at all. The rest had a foundation of brushwood, with chalk as to part and burnt ballast as to other parts, upon the brushwood. According to the evidence, it would cost £214 to make the road up to the same extent as *Cuddington Avenue* was made up; but if completed with both footpaths gravelled the cost would be £302 5*s*. The Chief Clerk considered that the latter sum ought to be allowed, and the summons was adjourned into Court at the request of the vendors. There was great conflict of evidence as to what was meant by a road being "made up:" and the judgment pointed out that the phrase was used in the evidence with five different meanings.

Napier Higgins, Q.C., and *G. Harris Lea*, for the purchaser:—

The statement that the road was made up amounts to a representation that the road had two footpaths gravelled. The conclusion arrived at by the Chief Clerk was correct. At the very least the purchaser is entitled to the £214 that it would cost to gravel the roadway and one path.

Cozens-Hardy, Q.C., and *E. Beaumont*, for the vendors:—

We submit that on a fair construction of the particulars there was no misrepresentation, the road was made up to the extent that would be expected by a purchaser on a partly undeveloped estate; it was sufficiently made up for building purposes.

Napier Higgins, in reply:—

The vendor will have to expend the money required to gravel the road and paths.

NORTH, J.:—

I am not satisfied that such would be the case. It may very well be that the road as it exists is in sufficiently good condition for the purpose for which it will be used, and that if the £214 were allowed to the purchaser he might put it into his pocket and make a profit out of it.

Do the vendors desire, if I find that there has been a misrepresentation, to make the road up or to pay compensation?

Beaumont:—They would prefer to pay such compensation as your Lordship may assess.

NORTH, J.:—

The conclusion I have come to is, that the representation made was that the road was made up as the rest of *Cuddington Avenue* was; that is to say, that the purchaser has not got what was represented to him, a road across this lot corresponding with the other portion of *Cuddington Avenue*.

Then, what is the compensation he is entitled to? There has been a great deal of evidence addressed to the question what it would cost to complete or make the road as it is described. In

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my opinion that is not the test. If the vendors chose to say, "Rather than pay any damages, we will compensate by completing the road," I think they would have had a right to do it; but in that case, they would have had to pay the full cost. They do not wish to do this, and the question is to what extent the purchaser is injured by not having got what it was agreed he should have. He paid £1500 for the estate on the footing that the road was such as stated in the particulars, as if *Cuddington Avenue* continued across this lot. The damage he has sustained is the difference between the actual value of the estate as it stood at the time of the purchase and what the actual value at the same date would have been if *Cuddington Avenue* had been continued across the lot in the same condition, to the same degree of completion, to the same degree of making-up, as that part of *Cuddington Avenue* which had been made. The cost of making really has nothing to do with it. It may be that for all practical purposes the road as it stands is quite good enough: that if the land was used for pasture a better road would be unnecessary: and that if used for building a completed road in the first instance would be a useless expense, having regard to the fact that the road would necessarily be much cut up in building operations. I do not think that it is as good; and I think there is some compensation to be made for it; but, in my opinion, the cost it would take to complete the road is no test whatever of the difference between the actual value of the estate and what would have been its value if the road had been made up as represented. There is no evidence addressed specifically to the question what that difference in value is; and all that I can do is to direct an inquiry what sum represents the difference between the actual value of the estate at the time of the purchase and what would have been its value at that time if *Cuddington Avenue* had been continued across the lot in the same condition in which it was outside the lot.

Solicitors for Purchaser: *Pickett & Mytton.*
Solicitors for Vendors: *Beaumont & Son.*

D. P.

NORTH, J.
1888
Nov. 2.

In re IRISH.
IRISH *v.* IRISH.

[1878 I. 18.]

Receiver and Manager of Business—Injunction—Restraint of Trade.

A business was carried on under the order of the Court for ten years by a receiver and manager not previously engaged in business. On proposals for a purchase of the business under the order of the Court, the Court refused to restrain the receiver and manager from soliciting orders from or doing business with the present customers.

THIS was an action for the administration of the estate of *Thomas Brand Irish*, a testator, the Plaintiffs being the testator's son and his two daughters, all infants, against the testator's widow and the trustees of his will. The son was still under age.

On the 4th of November, 1878, an order was made in the action directing that the business of the testator of manure merchant should be carried on in pursuance of the trusts of his will, and appointing *Joseph Green Hamling* manager and receiver of the business.

Mr. *J. G. Hamling* never had any business of his own, and had carried on the business of the testator under the order of Court up to the time of this application. When the order of November, 1878, was made it was intended that the business should be carried on till the testator's son should attain twenty-one, when he should have the option of entering the business. No restriction was imposed on or obligation entered into by Mr. *J. G. Hamling* as to his carrying on a similar business.

On the 15th of March, 1888, an order was made that the testator's business should be sold with the goodwill pursuant to the trusts of the testator's will with the approbation of the Judge.

A proposal had been made by Messrs. *W. & H. M. Goulding, Limited, Dublin*, for the purchase of the goodwill and stock-in-trade of the business of Messrs. *Irish & Son, Barnstaple*, manure, wool, and seed merchants (the testator's business), as a going concern. "If Mr. *J. G. Hamling*, the manager and receiver, is precluded and restrained from canvassing or soliciting orders from or doing

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business with the present customers of the business, either by himself or his agent, for his own benefit or for the benefit of others; and if satisfactory security be given us that he will be so precluded and restrained."

A summons was taken out on behalf of the testator's infant son for the purpose of getting the approbation of the Judge to the sale. The matter was brought on as a motion to restrain Mr. *J. G. Hamling* from soliciting orders from or doing business with the present customers of the testator's business. The purchasers declined to consent to any modification of the contract.

Cozens-Hardy, Q.C., and *Birrell*, for the Applicant:—

The Court has a summary jurisdiction over the receiver and manager, who is its own officer, to restrain him from doing anything inequitable in relation to his estate, and to prevent his taking an unfair advantage of the fiduciary position in which he has been placed by the Court: for instance, he will not be allowed to buy except by leave of the Court: *Alven* v. *Bond* (1). If a receiver takes a lease he is trustee for the estate: *White* v. *Tommy*, referred to in the judgment in *Alven* v. *Bond* (2). It will be inequitable for the manager who has gained his experience and his acquaintance with the customers by his employment to use that experience and knowledge in antagonism to the business.

Ingpen, for the trustees.

Crackanthorpe, Q.C., and *Upjohn*, for the receiver, were not called on.

NORTH, J.:—

The purchaser insists on the whole of this contract standing; that is, that the manager and receiver is to be restrained not only from soliciting, but from doing business with any of the present customers of the firm; he insists on the whole of that, and that I should impose those terms on him. I do not think I can do so. I know no authority for restraining a person not under covenant from carrying on business freely. I do not see that it makes any

(1) Flan. & Kelly, 196. (2) Flan. & Kelly, 224.

difference that the person sought to be restrained is an officer of the Court, except that the fact of his being such might enable me to act by summary process. He has been employed by the Court without any bargain as to not carrying on a similar business when he ceased to be so employed. If he had been employed by a private individual instead of by the Court it is quite clear that he could have done what it is now sought to restrain him from doing; for instance, if he had been employed by the testator in his lifetime, or by the son after he had attained twenty-one, I should have found great difficulty in restraining him from soliciting custom. But to restrain him from doing any business at all with the present customers of the firm is a thing it would be impossible to do, unless there was some contract for that purpose. There are many cases in which a person employed to manage a business by the Court has a similar business of his own. I have known of such cases myself: and no doubt there must be many others. In such a case it would be absurd to suppose that he could be restrained from carrying on business on his own account, without any contract to that effect. I have never heard it suggested that by reason of becoming a manager of another business, the Court being the employer, a man could not carry on a similar business of his own, or accept orders from the customers of the business after he ceased so to act. If during the time he was a manager he did anything inconsistent with his employment it would be a different matter, but to impose any such obligation on the manager as is here sought is a thing which it seems to me the Court will not do. I cannot impose such restriction upon a retiring manager when it has not been made a condition of his employment.

Solicitor for infant Applicant: *H. M. Dalston.*

Solicitors for Trustees: *Sismey & Sismey,* agents for *Crosse, Day, & Crosse, South Molton.*

Solicitors for Manager: *Clarke, Woodcock & Ryland.*

D. P.

NORTH, J.

1888

Nov. 10.

In re PAPER BOTTLE COMPANY.

Company—Winding-up Petition—Withdrawal by Petitioner—Costs.

When a petition for the winding-up of a company by the Court is withdrawn by the petitioner, each set of shareholders and each set of creditors appearing, whether to support or to oppose the petition, is as a general rule entitled to a separate set of costs, and this rule applies even when the petition is presented by the company itself.

Re North Brazilian Sugar Factories (1) followed.

THIS was a petition for the winding-up of the company by the Court. The petition was presented by the company itself, and it was in the paper for hearing to-day.

Eve, for the company, asked for leave to withdraw the petition on payment of costs.

Dibdin, for creditors who supported the petition; *L. Ryland*, for other creditors who supported the petition; *H. R. Williams*, for shareholders who supported the petition; *Bunting*, for shareholders who opposed the petition; and *P. S. Stokes*, for other shareholders who opposed the petition; argued that each set of creditors and each set of shareholders who appeared was entitled to a separate set of costs, and that the costs to be paid by the Petitioners should not be limited to one set of costs between the creditors, and one set between the shareholders.

[They referred to *Re North Brazilian Sugar Factories* (1); *In re District Bank of London* (2).]

[NORTH, J., referred to *In re Nacupai Gold Mining Company* (3); *In re Patent Cocoa Fibre Company* (4).]

Eve, for the company:—

Only one set of costs should be allowed for the creditors, and one set for the shareholders: *Buckley* on the Companies Acts (5); *In re Chepstow Bobbin Mills Company* (6).

(1) W. N. 1887, p. 3; 56 L. T. (N.S.) 229.
(2) 35 Ch. D. 576.
(3) 28 Ch. D. 65.
(4) 1 Ch. D. 617.
(5) 5th Ed. p. 212.
(6) 36 Ch. D. 563.

In some cases separate sets of costs have on the withdrawal of a petition been allowed to each set of creditors and shareholders appearing, but this is not the settled practice. In *Re North Brazilian Sugar Factories* (1) Mr. Justice *Chitty* did not intend to lay down any general rule.

NORTH, J.:—

I think that the judgment of Mr. Justice *Chitty* in *Re North Brazilian Sugar Factories* has made this matter clear, and I shall follow that case, unless it shall be found upon inquiry that there is (as the Registrar has suggested) a recent decision of the Court of Appeal to the contrary. In that case Mr. Justice *Chitty* said: "I know nothing of the merits of the case, as they have not been gone into. What has happened is, that the petitioner has abandoned his petition at the hearing. Shareholders and creditors have appeared—as they had a right to do—in answer to the statutory notices of the presentation of the petition. As it is the petitioner, and not they, who is in the position of *dominus litis*, and as the petitioner has abandoned his petition, it is immaterial to consider whether the shareholders and creditors oppose or support the petition. Nor is it necessary on that account to make any distinction when dealing with these claims for costs. Moreover, they are, in my opinion, entitled to separate sets of costs. The rule to allow one set of costs to creditors and one to shareholders appearing, only applies when a winding-up order is obtained, and when the costs would have to come out of the assets of the company. In fact, the rule is founded on the protection of the company's assets. In a case like the present, I am of opinion that, the payment of costs being personal, there is no reason for making any distinction. I believe that it has been previously so held. I remember cases where directors charged jointly with misfeasance have appeared separately, and, although making similar defences, have been allowed separate sets of costs. Of course, if I were satisfied that the shareholders and creditors had separately appeared simply for the sake of making costs, I should not allow separate costs. But as to that there is no evidence before me." I see no reason in this case for departing

(1) 56 L. T. (N.S.) 229.

NORTH, J. 1888 *In re* PAPER BOTTLE COMPANY.

from that rule merely because the petition has been presented by the company itself.

Solicitors: *W. F. Stokes; Crawford & Chester; Hawkins; Burn & Berridge; Ingle, Cooper, & Holmes; Mozley & Dennison.*

NOTE.—*Vide In re Peckham Tramways Company*, 57 L. J. (Ch.) 463, in which Mr. Justice *Chitty* explained his decision in *Re North Brazilian Sugar Factories*, 56 L. T. (N.S.) 229.

W. L. C.

LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD.

STIRLING, J.

1888

Aug. 8; *Oct.* 25.

[1888. L. 1487.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 16, 51, 54, 189, 190 [*Revised Ed. Statutes, vol. xvii., pp.* 528, 535, 543, 544, 580]—*Local Board—Carrying Water-mains*—"*Surveyor's*" *Report*—"*Necessary*"—*Injunction.*

By the 16th and 54th sections of the *Public Health Act*, 1875, urban local authorities are empowered to carry water-mains through, across, or under certain roads, streets, cellars, and vaults, and, after giving "notice to the owner or occupier (if, on the report of the surveyor, it appears necessary), into, through, or under any lands situate within their district."

In December, 1887, the surveyor of the Defendants, an urban local authority, died. On the 11th of January, 1888, the Defendants by resolution appointed *A. P.*, a civil engineer in their employment, "surveyor to the board until a further permanent surveyor be appointed." On the 21st of March, 1888, *A. P.* reported to the Defendants that it was "desirable and advisable" that their water-main should be carried in a particular direction from one point to another, and that it would be "necessary" to lay it through land belonging to the Plaintiff, which was within the district. This report was signed, "Your surveyor, *A. P.*" Four days after its date *X. Y.* was duly appointed surveyor to the Defendants, and *A. P.*, who was a candidate for the office, was retained in their service as waterworks engineer. The report of the 21st of March was considered and adopted by the board on the 11th of April, 1888, and in the following month a notice in pursuance thereof was served on the Plaintiff that the Defendants intended to carry their main through a part of his lands.

Upon motion made in an action by the Plaintiff for an injunction to restrain the Defendants from so doing, it was *held*:

First, that the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public."

Secondly, that upon the words of sect. 16 of the Act the person to determine the necessity was the surveyor; and that if the Court found that he had exercised his judgment and come to a conclusion in good faith, the Court ought not to interfere, even although other courses were shewn to be practicable by which the entry on private lands might be avoided; and

Thirdly, that "the surveyor" mentioned in sect. 16, must, in the case of an urban authority, be the fit and proper person duly appointed to be surveyor under sect. 189 of the Act, and no other; and that *A. P.* was not "the surveyor" of the Defendants within the meaning of sects. 16 and 189; and that as the report on which the proceedings of the Defendants was founded was not the report of "the surveyor," the Plaintiff was entitled to an interlocutory injunction.

MOTION.

This was a motion to restrain the Defendants, who are the urban local authority for the district of *Weston-super-Mare*, from

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carrying a 15-inch water-main through a piece of freehold land forming part of the garden of a house belonging to the Plaintiff and known as *Speden Ham*, and from entering on the Plaintiff's land for that purpose.

The piece of land in question was situate within the Defendants' district, and abutted on the north on the *Upper Bristol Road*, on the west on the *Arundell Road*, on the south on lands known as *Elm Side*, and on the east on lands belonging to the Defendants, which also abutted on the north on the *Upper Bristol Road*. The Defendants claimed to be acting under the powers conferred upon them by the *Public Health Act*, 1875, the material sections whereof are the following:—

Sect. 4. . . . . "'Surveyor' includes any person appointed by a rural authority to perform any of the duties of surveyor under this Act."

Sect. 16. "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district."

Sect. 51. "Any urban authority may provide their district, or any part thereof, and any rural authority may provide their district, or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for these purposes or any of them, may" (*inter alia*) "Construct and maintain waterworks, dig wells, and do any other necessary acts." (1)

Sect. 54. "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force."

(1) This power is permissive, but sect. 299 provides the means by which on complaint to the Local Government Board the local authority may in a proper case be compelled to undertake the duty.

Sect. 308 contains provisions enabling the owner and occupier of the land who has sustained damage by reason of the exercise of any of the powers of the Act to obtain compensation for the damage done.

Sects. 189 and 190 are also material upon the meaning of the word "surveyor," but they will be found set out in the judgment of the Court.

Under these powers the Defendants had undertaken to provide their district with a supply of water, and for this purpose had erected on lands of theirs, which adjoined those of the Plaintiff, a reservoir from which they desired to carry a main into the *Arundell Road*, between which and the Defendants' lands were situated the lands of the Plaintiff.

Previously to March, 1888, negotiations had taken place between the Plaintiff and the Defendants for the purchase by the latter of a strip of the Plaintiff's land, twenty feet wide, for the purpose of laying the main in question, but this had not resulted in any binding agreement being come to between the parties.

On the 21st of March, 1888, a report was made to the Defendants in the following terms:—"To the Local Board for the district of *Weston-super-Mare*, in the county of *Somerset*, being the urban authority of the said district.—March 21st, 1888.—Sirs,—I have the honour to report to you, in pursuance of sects. 16 and 54 of the *Public Health Act*, 1875, that it is desirable and advisable that your 15-inch water-main should be carried from *Arundell Road* into the south end of your reservoir at *Montpelier*, and that it will be necessary to lay the said water-main through land belonging to one *John Lewis* at south end of *Speden Ham*, premises within your district, and I therefore recommend that notice from you be forthwith given to him to that effect. I have the honour to be, Sirs, your surveyor—*Arthur Powell*." Mr. *Arthur Powell*, by whom the report was sent, and who designated himself "your surveyor," was a civil engineer in the employment of the Defendants. In November, 1887, he was appointed by the Defendants to act as the assistant of Mr. *John Willacy*, who was then their surveyor, but had fallen into a bad state of health. Mr. *Willacy* died in December, 1887, and on the 11th of January, 1888, the following resolution was passed by the Defendants:—

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"That Mr. *Arthur Powell* be appointed surveyor to this board until a permanent surveyor be appointed, at the same proportionate rate of salary as the late surveyor Mr. *Willacy* received, commencing from the 25th day of December last, and that he be subject to a week's notice to determine such appointment." Mr. *Powell's* appointment under this resolution was determined on the 25th of March, 1888, four days after the date of the report in question, when a Mr. *Collins* was appointed surveyor to the Defendant board. Mr. *Powell* was a candidate for the permanent office, but he was not elected. His services were still retained by the Defendants in the acting capacity of waterworks engineer, but he was said to act under the supervision of Mr. *Cousins*, of *Palace Chambers, Westminster*, the consulting engineer to the board for carrying out these works for the supply of water. The report of the 21st of March was taken into consideration by the board, and adopted on the 11th of April, 1888.

On the 18th of April the following notice, dated the 17th of that month, was served on the Plaintiff:—"To *John Lewis* of 278, *Oxford Street, London*.—We the Local Board of the district of *Weston-super-Mare*, in the county of *Somerset*, being the urban authority for the said district, hereby give you notice that on the report of our surveyor it appears necessary to carry, and we intend under and by virtue of the powers in that behalf conferred upon us by the *Public Health Act*, 1875, on or after the 4th day of May next to carry, a 15-inch water-main for the purpose of supplying water within the said district into, through, and under certain lands within such district of which you are the owner, that is to say, the south end of the garden or piece of land belonging to or adjoining your house called *Speden Ham*, in *Arundell Road*, commencing at the point marked "A" on the accompanying plan, and thence eastward in the direction of the line in the said plan coloured red to and terminating at the point marked "B" on the said plan, the said water-main to be laid at a depth beneath the surface of the land of four feet or thereabouts." After this, on the 23rd of April, the clerk to the board wrote to the Plaintiff stating that it had been arranged that the works should not be proceeded with until the 8th of May. On receiving that letter the Plaintiff informed the clerk of the

Defendants that if it proceeded he should apply for an injunction, and on the 31st of May the clerk wrote giving notice that they would enter the Plaintiff's land on the following Saturday, the 2nd of June. This, however, they did not do, and on the 4th of June the Plaintiff wrote declining to allow the Defendants to lay down the pipes on his land. On the 5th the clerk replied to the effect that if the Plaintiff did not voluntarily give possession a magistrate's order would be applied for under sect. 305 of the *Public Health Act*, 1875.

Finding no such order was applied for, and that the Defendants were carrying their pipes close up to each side of his land, the Plaintiff commenced this action on the 16th of June, 1888, and the same day applied for and obtained an *ex parte* interim injunction, and he now moved that such injunction might be continued till the trial of the action or further order.

Buckley, Q.C., and *Haldane*, for the Plaintiff:—

1. The *Public Health Act*, 1875, s. 16, only authorizes an urban authority to carry their water-mains through private lands "if it appears necessary." The report on which the Defendants are acting only states that it is "desirable and advisable" to carry the main in the direction which made it "necessary" to lay it through the Plaintiff's land. This is not enough in itself, and it is only the *ipse dixit* of Mr. *Powell* who signed the report, whereas the Defendants are bound to satisfy the tribunal before the question is raised, *i.e.*, the Court, that it was "necessary;" and enable it to judge whether the land was *bonâ fide* required: *Flower* v. *London, Brighton and South Coast Railway Company* (1). This they have not done.

[STIRLING, J.:—That case and *Flower* v. *Muspratt* and *Flower* v. *Frowd* afterwards went to trial, and the injunction was not continued.]

But the learned Judge, *Kindersley*, V.-C., still took the same view of the law. If the Defendants rely on *Stockton and Darlington Railway Company* v. *Brown* (2), that case is referred to and distinguished in *Flower* v. *London, Brighton and South Coast Railway Company*, and it differs from the present case in this, that

(1) 2 Dr. & Sm. 330, 335. (2) 9 H. L. C. 246.

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the lands taken were those described in the deposited plans, so that the owners had the opportunity of opposing the Act, while here there are general powers to interfere with private lands, and the terms of the enactment must be strictly followed.

2. Again, the report on which "it appears necessary" must be the report of "the surveyor" of the urban local authority, and Mr. *Powell* who made this report was not "the surveyor" of the Defendants, but an engineer, who was appointed as a temporary *locum tenens*, after the death of Mr. *John Willacy*, their surveyor, "until a permanent surveyor be appointed"; and whose appointment was determinable at a week's notice.

[They also referred to *Errington* v. *Metropolitan District Railway Company* (1), and sects. 4, 189, and 190 of the Act of 1875.]

Hastings, Q.C., and *E. Ford*, for the Defendants:—

1. The words of sect. 16 are "if on the report of the surveyor it appears necessary." The taking the land must of course be *bona fide*; but subject to that the local authority, who are charged with the performance of public duties, are the proper judges of the necessity; and the whole scope of the Act of 1875, as shewn by sects. 23, 24, 25, 94, and 95, shews that if on the report of their surveyor they judge it necessary that is enough: *Stockton and Darlington Railway Company* v. *Brown* (2); *Ex parte Saunders* (3).

2. Mr. *Powell* was by the terms of the resolution of the 11th of January, 1888, appointed "surveyor to this board," and he was surveyor of the Defendants at the date of the report, and none the less so because his appointment was determinable at a week's notice, for under the 189th section every officer of the board, including their surveyor, is removable at their pleasure.

3. The Plaintiff is precluded from relief by injunction by reason of delay and acquiescence.

Haldane, in reply.

1888. Oct. 25. STIRLING, J. (after stating the facts, continued):—

It was objected that the Plaintiff was precluded by his delay from applying for an injunction. Having regard to the commu-

(1) 19 Ch. D. 559. (2) 9 H. L. C. 246.
(3) 11 Q. B. D. 191.

nications and correspondence which passed between the parties, and the express statement made on behalf of the Defendants on the 5th of June, that a magistrate's order would be applied for, I am of opinion that this objection ought not to prevail. The Defendants claim the power to carry their main through the Plaintiff's land under sects. 51, 54, and 16 of the *Public Health Act*, 1875. [His Lordship then read the 16th, 51st, 54th and 308th sections of the Act of 1875, and continued:—]

The injunction was claimed on two grounds, first, it was said that it was not and did not appear by the report of the 21st of March, 1888, to be "necessary" to carry the main through the Plaintiff's land; and, secondly, it was contended that Mr. *Powell*, by whom the report was made, was not "the surveyor" within the meaning of sect. 16. Both these points raised questions upon the construction of the Act with which I propose to deal.

Now as to the first point, it was not contended that the word "necessary" in the 16th section was to be read as equivalent to "physically impossible to do otherwise." What was urged upon me was that the route chosen by the Defendants must, according to that section, "appear necessary" to the tribunal which is to determine the question if raised; that is, I suppose, to the Court of first instance in the first place, and to the Court of Appeal if the decision of the Court of first instance be not acquiesced in, and finally the House of Lords if that tribunal should be resorted to. Now there are few engineering questions on which it is not found that engineers of the greatest eminence take different views; and if the true construction of the enactment be that contended for by the Plaintiff it appears to me to follow that no local authority can act upon a report of the kind in question without the risk of a protracted litigation, the result of which would depend on the view taken by the Court, whose decision was ultimately invoked, of the conflicting evidence of experts. In my opinion the enactment is not to be so construed. Although, apparently, the question now arises for the first time upon this particular Act, analogous questions have often been previously raised on similar enactments in other Acts of Parliament, and it is important to see how such enactments have been dealt with by the Court.

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The law on the subject is thus stated by Lord *Cranworth* in the leading case of the *Stockton and Darlington Railway Company* v. *Brown* (1). He says (2): "I think it clear that when the Legislature authorizes railway directors" (he was there dealing with a railway company) "to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them *bonâ fide* with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." Lord *Cranworth* was there dealing, as I have said, with a railway company whose directors were the body entrusted with the powers sought to be exercised, and were acting in the interests of their shareholders. But the principle stated by him may even more readily be applied where the powers are vested in a public corporation charged with the performance of important public duties and acting for the benefit of the whole community.

That is shewn among other cases by those of *Galloway* v. *Mayor of London* (3), and the *North London Railway Company* v. *Metropolitan Board of Works* (4). The latter of these cases also shews that it is not, as was suggested in argument, necessary for the application of the principle that the lands on which the power is to be exercised should be specifically defined by means of plans and books of reference or otherwise.

Having regard to these cases, even if the words were simply "if it appears necessary," I should be of opinion that the persons

(1) 9 H. L. C. 246.
(2) Ibid. 256.
(3) Law Rep. 1 H. L. 34.
(4) Joh. 405.

to judge of the necessity were the local authority or competent persons employed by them to advise them upon the question. The words, however, are, "if on the report of the surveyor it appears necessary;" and upon these words I think the person to determine the necessity is the surveyor.

As to the mode in which he is to exercise his judgment, the case of *Flower* v. *London, Brighton and South Coast Railway Company* (1) was referred to on behalf of the Plaintiff. In that case a railway company were desirous of taking two pieces of land in such a position that, *primâ facie*, they would not be required by the railway company. The Vice-Chancellor in (2) his judgment says, "on the face of it" (that is, on the face of the plan), "and if there was no evidence on the subject, I should ask: 'What can the company want with those pieces of land?'" Moreover, the railway company had not included them in two notices to treat which they had given in the first instance, and there was evidence, on behalf of the plaintiff, that the railway company did not and could not want them for the purposes of the railway. A motion for an injunction to restrain the railway company from taking them was made, and the argument of the counsel for the plaintiff was apparently that they were not taking them *bonâ fide*, but taking them for some purposes which were not within the scope of their Acts. The only evidence adduced by the railway company was an affidavit of the engineer stating simply, in so many words and without anything more, that the lands were or would be required for the purposes of the company, but he did not specify the purposes for which they would be required. Upon this evidence the Vice-Chancellor *Kindersley* came to the conclusion that the lands were not *bonâ fide* wanted for the purposes of the company, and granted an interlocutory injunction. In his judgment he says this (3): "The plaintiff's counsel insist that the company cannot take them; and they say that, looking at the plans, it is evident that it is not possible that the company can want them for their line of railway. On the other hand, on the part of the company, Sir *Charles Fox*, the engineer of the line, says in his affidavit that in his opinion the fragments of the

(1) 2 Dr. & Sm. 330. (2) 2 Dr. & Sm. 335.
(3) 2 Dr. & Sm. 333.

STIRLING, J. land in question are or will be required for the purposes of the Act. He does not say for what specific purposes, but simply they are or will be wanted; and the question is, whether the railway company has a right to take any lands or houses or premises of any kind whatsoever simply because their engineer makes an affidavit that they are or will be required for the purposes of the Act, without saying what those purposes are. If that be the law, it is hard to conceive a law more likely to be detrimental to the interests of the public; because the effect would be that no court of justice would have the power to try the question," (now observe what the question is) "whether any given premises are fairly and *bonâ fide* wanted for the purposes of the railway, provided only the engineer will make an affidavit saying that they are or will be wanted. In the present case, the engineer who makes the affidavit is above all suspicion of being capable of acting dishonestly; but there might be cases where the engineer might not be so trustworthy, and might make such an affidavit dishonestly and even falsely; and it being a matter of opinion only and not of fact, it could never be proved that he had sworn falsely." Then the Vice-Chancellor refers to the case of *Stockton and Darlington Railway Company* v. *Brown* (1), which I have mentioned, and says: "In the course of the argument I was pressed to assume, because there appeared nothing in the report to the contrary, that in that case there was no statement of the purposes for which the premises were required; but I have caused search to be made for the pleadings, and it appears that in the answer and in the affidavits the purposes for which the company desired to take the land were fully and particularly set out; and the contention raised by the landowner was that those purposes could just as well be carried into effect by taking a different part of his land from that part which the company proposed to take." Then he states the different stages of the case, and continues: "The House of Lords decided not that the mere *ipse dixit* of the engineer was conclusive, but that inasmuch as the purposes were specified, and appeared to be *bonâ fide* required for the undertaking, the question what particular land should be taken for those purposes must be entirely in the

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(1) 9 H. L. C. 246.

discretion of the company." Upon that the Vice-Chancellor granted an interlocutory injunction. But it appears that the case did not stop there, but it went to trial along with two other cases of *Flower* v. *Muspratt* and *Flower* v. *Frowd*. The proceedings at the hearing are reported, so far as I have been able to discover, only in the 6th volume of New Reports, p. 200, and it appears from the report that at the trial fresh evidence was adduced by the company to shew that the pieces of land were wanted, comprising an affidavit of Sir *C. Fox*, their engineer, specifying the purposes for which they were wanted, and that cross-evidence was put in by the plaintiff to shew that the lands in dispute were not wanted. In giving judgment the Vice-Chancellor said (1) that he adhered to the opinion expressed by him on the former occasion in the same case, "that the company ought not to be allowed to take the land under the powers of their Acts, on the mere general affidavit of their engineer that they were wanted for the purposes of the Act. It was for the Court to be satisfied that the lands were *bonâ fide* wanted for the purposes of the Act, and to see that the land was not taken merely on speculation, and to make a profit by selling it again. But now the company had given fresh evidence as to the specific purposes for which the land was wanted, and the Court had not the means to go beyond this." By that the Vice-Chancellor means, as I take it, that the Court would not inquire beyond being satisfied by the specific statement of the engineer, because it is stated that there was cross-evidence put in by the plaintiff to shew that the defendants' engineer was wrong. The Vice-Chancellor goes on: "It could not say, for instance, you must only take so much, for that will be sufficient for your purposes. To that extent it must trust the oath of the engineer. No doubt there were circumstances to excite suspicion that the land was not *bonâ fide* wanted, viz., the fact that, in the original notices to treat, the land in dispute was not contained, and the awkward shape of the land; but he thought the company had fairly answered these objections by saying that when the first notices were sent, their plans were immature. As to the shape of the pieces registered, though the company might not have taken such pieces for the purposes

(1) 6 N. R. 201.

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required, and though they might have taken one large piece elsewhere, yet, as they found that they would get these pieces cheaper, and that they would do for the purposes required, they had a right to take them." And the injunctions were refused. So that at the trial, upon the further evidence he declined to continue the injunction.

The result of that case appears to be that the engineer was bound to exercise a *bonâ fide* judgment in the matter; and further, that when his judgment was contested in a Court of Law, he was bound to give evidence in such a way as to enable the Court to judge whether he had acted *bonâ fide*, and to satisfy the Court that he had done so, but that, upon being so satisfied, the Court declined to interfere.

In the argument before me some stress was laid upon the word "necessary," which occurs in the Act; and it was said that that word was not to be construed as meaning simply "convenient." That, of course, is a question of construction, and upon that I would refer to one case, not as governing this, but as shewing the principle upon which the word "necessary" has been construed by the Court with reference to similar matters. It is the case of *Sanderson* v. *Cockermouth and Workington Railway Company*, which is reported in 11 Beavan, p. 497, but more fully in 7th Railway Cases, p. 613. The case in its nature was a different one from this; it related to the specific performance of an agreement between the plaintiff and the defendants for the sale of certain land, and there was a stipulation that the company should make such roads, ways, and slips for cattle "as might be necessary." The question arose in a suit for specific performance as to the meaning of that word "necessary" occurring in the agreement. Lord *Langdale*, the Master of the Rolls, says (1): "The word 'necessary' must receive a reasonable interpretation, having regard to the circumstances and situation of both sides; and I must construe it with reference to what is proper to be done by one for the convenience of the other. I consider the expression to mean such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the several (2) portions of the plaintiff's land," and he

(1) 7 Rail. Cas. 617.

(2) *Sic*, but *quære* "severed."

directed an inquiry before the Master what roads, ways, and slips for cattle were necessary and proper for the purpose of obtaining and preserving a convenient communication between the portions of the plaintiff's land which were severed by the railway. The case was appealed from, and came before Lord *Cottenham*. Lord *Cottenham* did not discuss the construction, but he affirmed simply the judgment of the Master of the Rolls, stating that in his opinion the Master of the Rolls had taken the proper view. I am not citing that case as governing the present one, but as shewing (which perhaps did not want any authority) that, in construing the document before the Court, the surrounding circumstances are to be looked at, and a reasonable construction is to be put upon the word "necessary," having regard to those circumstances.

Now here the Legislature are dealing with public bodies who are charged with the performance of certain public duties of great importance. In the performance of these duties the interests of the public are primarily to be regarded; and in such a case it seems to me that "necessary" may well mean necessary for the efficient discharge of the duty in the way which is most for the benefit of the public. In the natural course of things the sewers and water mains would generally be laid under streets, and the Legislature evidently contemplated that this would be the case; but if the public interest requires it, if the sewage can be more efficiently removed, or the water be better conveyed by laying the sewers or mains under the lands of private individuals, it seems reasonable that the board should have power to adopt such a course, and I think that power to do this was intended to be conferred: that is to say, the local authority have power given them (not to take, but) to carry the sewers or mains through any lands within their district, making compensation for damage done. I think, therefore, it was the duty of the surveyor to take all the circumstances of the case into consideration, and come to a conclusion as to the best course to be pursued, and to report accordingly, saying what was necessary to be done in order to carry into effect the scheme which commended itself to his judgment.

If the Court finds that the surveyor has exercised his judgment

STIRLING, J. and come to a conclusion in good faith, I apprehend that, according to the authorities cited, the Court ought not to interfere, although other courses by which the necessity of entering on private lands might be avoided, may be pointed out, and may be admitted to be practicable, and even although engineers of great eminence might come forward and say that they themselves would have reported in favour of the adoption of such alternative course.

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The second objection by the Plaintiff was that Mr. *Arthur Powell* was not the surveyor within the meaning of the 16th section of the *Public Health Act*. The material sections to be considered with reference to this are the 189th, the 190th, and part of sect. 4, which is the interpretation clause. Sect. 189 says: "Every urban authority shall from time to time appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer." Then there is a proviso which is immaterial, and it goes on, "Every urban authority shall also appoint or employ such assistant collectors and other officers and servants as may be necessary and proper for the efficient execution of this Act, and may make regulations with respect to the duties and conduct of the officers and servants so appointed or employed." Then the following section deals with the rural authorities, and it differs somewhat in the mode in which it is expressed: "Every rural authority shall from time to time appoint fit and proper persons to be medical officer or officers of health, and inspector or inspectors of nuisances; they shall also appoint such assistants and other officers and servants as may be necessary and proper for the efficient execution of this Act."

There is no power to appoint a surveyor, and by the interpretation clause, sect. 4, "'Surveyor' includes any person appointed by a rural authority to perform any of the duties of surveyor under this Act." So that it appears from that, that under the words "appoint such assistants and other officers and servants as may be necessary and proper for the efficient execution of this Act," a rural authority has the power to appoint a person to perform part of the duties of the surveyor under this Act, and in the case of the rural authority, such person is to be deemed as

included in the term "surveyor." But there is no such provision with reference to urban authorities, and in my opinion "the surveyor" mentioned in sect. 16, dealing with the urban authority, is the fit and proper person duly appointed to be surveyor under sect. 189 of the Act and no other, not even an engineer of the greatest eminence whom the authority may see fit to consult with reference to works on which they are engaged.

The question then arises, was Mr. *Arthur Powell* such a person? In my opinion, he was not. The board have never come to the conclusion that he was a fit and proper person to be their surveyor within the meaning of sect. 189. All that they have determined is that he was competent, first, to be their assistant-surveyor, and, secondly, to discharge such of the duties of surveyor as might be necessary or proper to be discharged during the vacancy in the office of surveyor. He was, in fact, as it seems to me, in the language of the Act, "an officer or servant necessary or proper for the efficient execution of the Act," but not "the *surveyor*" within the meaning of sect. 189 or sect. 16.

It is said that the present surveyor, who is admitted to have been duly appointed, and to be "the surveyor," has made an affidavit, in which he takes the same view, and approves of the report of Mr. *Powell*. I think, however, this is not material for the present purpose. The Defendants seek to avail themselves of the powers conferred upon them by statute to take lands in derogation of the Plaintiff's right, and, so doing, they must follow strictly the terms of the power. The existence of a report by "the surveyor," on which the acts contemplated by them appear to be necessary, is, in my judgment, a condition precedent to the doing of those acts; and, as I think the report of the 21st of March, on which the whole of their proceedings are founded, was not the report of "the surveyor" within the meaning of the section, the Plaintiff seems to me entitled to an injunction until the trial of the action or further order to restrain the Defendants from acting on the notice of the 18th of April, 1888.

It becomes unnecessary to express any opinion on the other points of the case; but it may be right to say that I have not been able to satisfy myself on the existing evidence whether

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Mr. *Powell* (supposing him to be the surveyor) has done that which I think he would have been bound to do, viz. exercised an independent judgment as to the necessity of adopting the course intended to be pursued by the board, or whether he has not in truth, without exercising any judgment on the case, adopted the views of Mr. *Edward Cousins*, under whose supervision he is stated to act. In saying that, I am not at all to be understood as meaning that the board or Mr. *Powell* may not avail themselves of the benefit of Mr. *Edward Cousins*' assistance. My view is that the surveyor of the board is not entitled simply to leave it to Mr. *Edward Cousins* to say what should be done, but ought in each case to exercise a judgment of his own.

I think, therefore, there ought to be an injunction to restrain the Defendants from entering on the Plaintiff's land in pursuance of the notice of May, 1888, and from doing the acts complained of in pursuance of that notice; and as regards the costs, having regard to the nature of the case, I think it will be better to reserve them.

Solicitors: *Underwood, Son, & Piper*; *Daubeny & Mead, for Wm. Smith & Sons, Weston-super-Mare.*

W. W. K.

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[1887 J. 474.]

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Annoyance—Nuisance—Covenant for quiet Enjoyment—Liability of Lessors—Injunction—Damages.

July 30, 31; *Aug.* 1, 2, 3.

A. granted a lease to *B.* of two rooms with a covenant for quiet enjoyment. Then *A.* let a room above the two to *C.* for dancing and other entertainments. *A.* brought this action against *B.* and *C.* for an injunction to restrain such use of the upper room, alleging that the dancing over his head and the behaviour of visitors on the stairs was a breach of the covenant and a nuisance:—

Held, that the annoyance was no breach of the covenant:

Held, also, that the annoyance from the dancing was a nuisance, and damages given:

Held, also, that the annoyance from visitors on the stairs was not a nuisance for which *B.* or *C.* was liable.

Shaw v. *Stenton* (1) and *Sanderson* v. *Mayor of Berwick-upon-Tweed* (2) explained.

By an indenture of lease, dated the 1st of December, 1877, *W. Stancomb*, as mortgagee, at the request of *J. E. Jackson* and *C. J. Jackson*, owners of the equity of redemption, demised to *John Jenkins* two large rooms on the first floor of the *Philharmonic Buildings* at *Cardiff*, with all rights, easements, privileges, and appurtenances to the demised premises belonging or appertaining, for the term of twenty-one years, at yearly rents increasing from £60 to £80. The lease contained several covenants by the lessee, and (with other covenants by the lessors) a covenant that "he, the said *John Jenkins*, his executors, administrators, and assigns, paying the rent hereby reserved, and observing and performing all the covenants hereinbefore contained, shall and may peaceably and quietly possess and enjoy the hereby-demised premises during the said term, without any eviction or disturbance by the said *J. E. Jackson* and *C. J. Jackson*, or either of them, their or either of their executors, administrators, or assigns, or by the said *W. Stancomb*, his executors, administrators, or assigns, or any person lawfully or equitably claiming from or under them, or any of them respectively."

(1) 2 H. & N. 858. (2) 13 Q. B. D. 547.

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John Jenkins took the lease of these rooms for the purpose of using them as offices in his business of accountant, auctioneer, and agent, and it was frequently necessary for him, his partners, and clerks, to work at the said offices until late in the evening—until ten o'clock according to the evidence.

J. E. Jackson and *C. J. Jackson*, after granting the lease to *J. Jenkins*, allowed *F. Summers* to use a large room immediately above the rooms demised to *Jenkins*, for the purpose of dancing, musical and other entertainments, and it was so used.

Jenkins brought this action against *J. E. Jackson*, *C. J. Jackson*, and *F. Summers*, alleging (as appeared by the evidence to be the case) that the above-mentioned entertainments caused noise and vibration in his offices below, and that the persons who frequented the entertainments occasioned a nuisance on the staircase and approaches. And the Plaintiff alleged that it was impossible for him or his clerks quietly, peaceably, and with reasonable comfort, to possess and enjoy the offices. And the Plaintiff claimed an injunction and damages.

The Defendants denied the annoyances, and alleged that the Plaintiff, when he took the rooms, knew that there was a large hall above them, and that the building was constructed for the express object of being used as a music-hall, and had been so used before the lease to the Plaintiff, and that he had acquiesced in such use. The Defendants also alleged that the nuisances on the staircase were not occasioned by them, and that they were not legally liable. It appeared from the evidence that *Summers* had merely from Messrs. *Jackson* the right to use the rooms three times a week, and that the arrangement was merely from week to week.

The action now came on for trial.

Warmington, Q.C., and *R. J. Parker*, for the Plaintiff:—

The acts complained of are clearly a breach of the covenant for quiet enjoyment, which cannot be restricted to title, especially in a lease. This was held in *Shaw* v. *Stenton* (1), and in *Sanderson* v. *Mayor of Berwick-upon-Tweed* (2). Such an annoyance will also be restrained under the general law.

(1) 2 H. & N. 858. (2) 13 Q. B. D. 547.

Witnesses were then examined on both sides as to the nuisances and noise and vibration.

Neville, Q.C., and *Prance*, for the Defendants:—

A covenant for quiet enjoyment does not extend to protection from nuisance. *Shaw* v. *Stenton* (1) was a case of trespass. *Howell* v. *Richards* (2) shews that this covenant only relates to a defective title. Messrs. *Jackson* ought not to be parties, as they are not the occupiers: *White* v. *Jameson* (3).

[KEKEWICH, J., referred to *Winter* v. *Baker* (4).]

Warmington, in reply:—

In *Edge* v. *Boileau* (5) a notice by the lessor to the tenants not to pay rent was held a breach of the covenant for quiet enjoyment.

[KEKEWICH, J., referred to *Anderson* v. *Oppenheimer* (6).]

Summers is within his rights as between him and Messrs. *Jackson*, and they are properly parties, and are liable.

KEKEWICH, J., expressed his opinion that the duty of deciding this case would have been better performed by a jury, but he must come to a conclusion on the evidence before him. As to the nuisance on the staircase, the Plaintiff had cause for complaint, but under the circumstances the Defendants could not be held legally responsible for it. As to the annoyance caused by the dancing, the evidence was not altogether satisfactory, but his Lordship came to the conclusion that there had been considerable noise and vibration, and sometimes an interference with the work of the Plaintiff. As to the alleged acquiescence by the Plaintiff, his Lordship thought it rather forbearance.

His Lordship then proceeded: These being my views as to the facts, I have now to consider what are the rights of the Plaintiff. The Plaintiff rests his case, in the first place, on the covenant for quiet enjoyment, and the point so raised is one of importance.

(1) 2 H. & N. 853.
(2) 11 East, 633.
(3) Law Rep. 18 Eq. 303.
(4) 21 April, 1887, 3 Times L. R. 569.
(5) 16 Q. B. D. 117.
(6) 5 Q. B. D. 602.

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He has a lease, and in that lease there is a covenant in the usual terms. Those terms vary very little in one lease from another, but it is a covenant that he "and his executors, administrators, and assigns shall and may peaceably and quietly possess and enjoy the hereby demised premises during the said term without any eviction or disturbance by the said *J. E. Jackson* and *C. J. Jackson*," or any persons lawfully claiming under them. It is in the ordinary form; and before passing further let me observe, lest there should be a mistake, that "quietly" does not mean undisturbed by noise. When a man is quietly in possession it has nothing whatever to do with noise, though the word "quiet" is frequently used with reference to noise. "Peaceably and quietly" means without interference—without interruption of the possession. It may be called a covenant for title, and it is to be found with other covenants for title in deeds of conveyance. But Mr. *Warmington* was right in saying that it must not be regarded when it is inserted in a lease as a mere covenant for title as, there is something between lessor and lessee which is different; still the covenant is in the first place directed against a defect of title. That view of the covenant was certainly understood in *Shaw* v. *Stenton* (1), which is relied upon by the Plaintiff as entitling him to relief in this case. But that case was very different from this. It was a case in which the lessor having mines above the seams of coals which he demised to the Defendant, so worked those mines as to damage the coal below. That was held to be within the covenant for quiet enjoyment. The case is an authority that a covenant for quiet enjoyment goes beyond rightful acts, that is to say, the rightful acts of a person who comes by virtue of his title. It extends, as was said in argument, and was also said in the judgment, to wrongful as well as rightful acts. But that was a case where there was actual physical interference with the thing demised, and in the course of the argument Chief Baron *Pollock* put a case which is very near this but does not quite touch it. He said: "Suppose a person demises a set of chambers beneath his own with a covenant for quiet enjoyment" (and that is just what the *Jacksons* did) "and then does some act of annoyance in his

(1) 2 H. & N. 858, 863.

own, which renders the other chambers uninhabitable, would not that be a breach of the covenant?" He does not answer the question, but it is put in such a way that one would assume the learned Judge to mean that it would be answered in the affirmative. But later on, in the course of the argument in which that was interposed, the learned counsel who was arguing the case said (1): "Suppose a demise of a house, and that the lessor afterwards erects near to it chemical works which emit so disagreeable an effluvia as to annoy the inhabitants of the house, would that be a breach of the covenant?" The Chief Baron, in giving judgment, referred to that, and said that counsel had "put the case of a person who, having demised a house and entered into such a covenant, did some act on the adjoining land which caused a nuisance to the lessee. It is not necessary to say whether that would be a breach of the covenant: probably not." There is the *obiter dictum*, no doubt; but so far as the Lord Chief Baron's judgment goes, it is against that being held a breach of the covenant. The case of *Sanderson* v. *Mayor of Berwick-on-Tweed* (2), may be referred to as indicating what was the doctrine of *Shaw* v. *Stenton* (3). There the judgment on appeal from the Queen's Bench Division was given by the Lord Justice *Fry*, and he says (4): "The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by *Cairns*, who is a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land." In that case there was water and drainage actually coming into the field demised and making it, to use the words of the Lord Chief Baron, uninhabitable, that is to say, interrupting the actual physical enjoyment. That seems to be the meaning of the passage in which the Lord Justice laid down this:—"It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although

(1) 2 H. & N. 864, 865.
(2) 13 Q. B. D. 547.
(3) 2 H. & N. 858.
(4) 13 Q. B. D. 551.

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neither the title to the land nor the possession of the land may be otherwise affected." But that does not seem to me to extend to such a case as was put by counsel in the argument in *Shaw* v. *Stenton* (1), and dealt with in the way I have mentioned by the Lord Chief Baron. To my mind, it would be an extension of the meaning hitherto given to a covenant for quiet enjoyment to say that what is really (if it is anything), a nuisance committed on adjoining land (because the room above is in that sense adjoining land) by the lessor or his tenant, is a breach of the covenant for quiet enjoyment. Mr. *Warmington* argued very strongly, and I followed him, that he was entitled to a specific performance of the covenant, and that unless some equity was set up by the other side, and set up with success, there was no answer to a claim for specific performance, which specific performance would be granted in the shape of an injunction. With that observation of his I entirely concur, but in order to justify the specific performance in the shape of an injunction, you must first shew that the covenant has been broken. In order to shew that it has been broken, you must shew that the act complained of comes within the meaning of the covenant, and for the reasons which I have endeavoured to explain, I do not think that in this case there has been any breach of the covenant. Therefore, on that ground I am not in favour of the Plaintiff as to that part of the case.

I now go on to the more general law, which is not so interesting perhaps to lawyers as the point with which I have been dealing, but which nevertheless is one of considerable interest. *Summers*, of course, in the view which I take of the case, is liable. There has been noise to cause inconvenience to the occupiers of the office below, and he is the chief actor, who is responsible for that noise, which at any rate can be prevented by not having any dancing, and it follows as a matter of course that he is liable.

As regards Messrs. *Jackson*, the position of matters is this. They are Mr. *Summers's* landlords. I use the word "landlords" intentionally, because there is some distinction between a "landlord" and a "lessor," and, as has been pointed out, Mr. *Summers*

(1) 2 H. & N. 858.

was not a lessee. They are almost licensors, though not exactly so. Messrs. *Jackson* have given Mr. *Summers* a weekly right to use this room on three nights a week for the purpose of dancing, and they have done that after notice again and again given to them that the room is being used for a purpose which is a nuisance to their own tenant occupying the rooms below. Now to my mind that brings this case directly within *White* v. *Jameson* (1), as explained by myself in the case of *Winter* v. *Baker* (2). I considered at the time that I was going a step beyond *White* v. *Jameson*, but a step which the case required. I read the case from the report, which is quite sufficiently accurate, and Mr. *Neville* at once said that it having been decided, not by any other Judge but by myself, he was bound to submit to it in this Court. Accordingly I hold that Messrs. *Jackson* are liable.

Then the question comes, for what are they liable? They are liable, as I have already said, for some disturbance to the Plaintiff's premises. Now what is that disturbance? [His Lordship then expressed his opinion that from the way in which complaints had been made, mixed up with other things, the disturbance had not been so serious as it had been represented, but still there was something.]

Finding for the Plaintiff, as I do, that there has been a disturbance to that extent, what relief ought I to give him? Am I bound to grant an injunction? Mr. *Warmington* has argued that I must, because he rests his case on the covenant. I have already said that if I rested the case on the covenant, I think I should be bound to grant an injunction, but I am not resting the case on the covenant. I rest it on the general law, and I know no cogent reason for granting an injunction, so that I fall back on the general balance of convenience. What presses me most is this: if I were to grant an injunction, it must be enforced by means of a motion to commit, and I am bound to remember that a motion to commit might, and probably would, come before a Judge other than myself. I think the Judge before whom a motion to commit came would be unduly fettered by such an injunction, if any such were granted as I can now grant. He would be bound to say that what was going on at the date immediately

(1) Law Rep. 18 Eq. 303. (2) 21 April, 1887, 3 Times L. R. 569.

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before the trial was held to be a nuisance, and that it was injurious. If there is no substantial difference then from what was going on, the nuisance continues, and the committal follows as a matter of course. The real question which ought to be tried between these parties—if they have not the good sense to prevent the trial of any question at all—and the real question which ought to be tried, namely, whether what is now being done, or at any time hereafter should be done, is really a substantial nuisance to the Plaintiff—would not be tried at all on such a motion. That is the necessary result of an injunction followed by a motion to commit. That, to my mind, is a reason, on the balance of convenience, why I should not grant an injunction.

Then, again, I cannot help thinking that the subject of complaint is partially if not wholly remediable. I think that Mr. *Summers* might take more care in the way in which he conducts his dancing; that the partitions might be improved, and probably the floor might be altered. And though, of course, dancing will always produce some noise and vibration, and the music will always occasion some noise, still I think there ought to be no real difficulty in conducting dances without any such interference with the Plaintiff as would justify an injunction or give a cause of action. That also operates upon me as against an injunction. On the other hand I think that, if the Plaintiff has damages—and I am speaking of, practically, only nominal damages—he will get the relief he is really entitled to. It is a decision in his favour on the legal question, and he can enforce his legal right afterwards. I think it will put the Defendants in the position that, if they do not mend their ways or alter the premises, they will be liable to an injunction, and that therefore both parties will, by means of the action and the judgment, be placed in a position which will put before them what their rights and liabilities are. Therefore, weighing those things together, I am not disposed to grant an injunction.

Having gone through the case with some care, and at more length than it deserved, in the hope that it might aid in preventing litigation hereafter about a matter which I think ought not to be the subject of litigation, the judgment I intend to give is this. I give judgment for the Defendants, so far as the

action complains of unmannerly and offensive behaviour on the staircase and approaches; and the Plaintiff must pay the costs of the action to that extent. As regards the noise and vibration, I give the Plaintiff £20 damages, and he must have the costs of the action except so far as they are before ordered to be paid by him. I am sensible that £20 is a jury's assessment, but, as I have had occasion to say before, I must use my privilege as well as my duties in these matters, and it is not a question of compensation, because it cannot be put into pounds, shillings, and pence. It is only intended to shew that I think the Plaintiff has a cause of action, and a cause of action which will give him rights against the Defendants on a future occasion, if unfortunately the Defendants do not so behave as to prevent him from having any right to complain.

Solicitors for Plaintiff: *Fielder & Sumner*, agents for *W. Jones, Cardiff.*

Solicitor for Defendants: *O. B. Wooler.*

C. M.

C. A.
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KEKEWICH, J.
May 15, 16.
C. A.
Oct. 26, 27.

TOD-HEATLY *v.* BENHAM.

[1887 H. 2729.]

Injunction—Restrictive Covenant—Annoyance and Grievance.

The establishment of a hospital for the treatment of outdoor patients suffering from diseases of the throat, nose, ear, skin, and eye, fistula, and other diseases, is a breach of a covenant in a building lease against carrying on certain specified trades, or doing any act "which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or assigns, or the inhabitants of the neighbouring or adjoining houses"—and will be restrained by injunction.

In order to enforce such a covenant it is not necessary to shew that actual damage or pecuniary loss has been sustained. It is sufficient without proving actual risk of infection that sensible people feel a reasonable apprehension of risk, and interference with the pleasurable enjoyment of their houses for ordinary purposes, as distinguished from a mere fanciful feeling of distaste entertained by sensitive persons.

Per LINDLEY, L.J.:—Without deciding that the existence of such an hospital is *per se* an annoyance, the apprehension of risk of infection entertained by reasonable men amounts to a breach of the extra protection intended to be given to the covenantee by the introduction into the covenant of the words "annoyance" and "grievance" in addition to "nuisance or damage."

Harrison v. *Good* (1), in limiting the term "nuisance" in a restrictive covenant to that which is a legal nuisance, questioned.

Held, also, that the covenant was not confined to the lessor and his own sub-tenants, but would be broken by annoyance to the inhabitants of neighbouring or adjoining houses.

ACTION.

By lease of the 16th of April, 1823, *Catherine Lee* (the lessor) demised to *James Brake* (lessee), his executors, administrators, and assigns, a piece of land at *Old Brompton*, together with the dwelling-house and buildings erected thereon, which dwelling-house was intended to form part of certain new buildings to be called *Gloucester Terrace*, for the term of ninety-nine years from the 25th of June, 1820. The lease contained a covenant by the lessee that he, the lessee, his executors, administrators, or assigns, or any or either of them, would not during the term thereby

(1) Law Rep. 11 Eq. 338.

granted use, exercise, or carry on, or permit or suffer any other person or persons whomsoever to inhabit, dwell in, use, or occupy the said messuage or premises, or any part thereof, "who shall use or exercise therein the trades or business of a tallow chandler or melter of tallow, soap-boiler, slaughterman, distiller, brewer, lamp-black maker, salammoniac manufacturer, or any other noisome, obnoxious, or offensive trade or business" without the express license and consent of the lessor, her heirs and assigns, "nor do or wittingly or willingly cause or suffer to be done any act, matter, or thing in or upon or about the said premises, which shall or may be or grow to the annoyance, nuisance, grievance or damage of the lessor, her heirs and assigns, or the inhabitants of the neighbouring or adjoining houses."

The dwelling-house comprised in the above lease was known as 6, *Gloucester Terrace, Brompton.* The adjoining houses 7 and 8 *Gloucester Terrace* formed part of the original lessor's estate, and had been demised in plots for building purposes subject to covenants similar to those contained in the lease of April, 1823.

In December, 1886, the Defendant, Dr. *Benham*, became the occupier of No. 6, *Gloucester Terrace* under an agreement for a lease, with, it was alleged, notice of the covenants contained in the original lease, and in February, 1887, the premises were opened by him as "the *Queen's Jubilee Hospital* and *Surgical Appliance Department* for the treatment of diseases of the throat, nose, ear, skin, eye, fistula, and other diseases of the rectum, and various deformities of the human frame"—the Institution, which was intended for poor out-patients, being supported by voluntary contributions.

In restraint of this alleged breach of covenant this action was brought by Mr. *Tod-Heatly*, the owner of the reversion of the demised property, and by Messrs. *Elliott & Fry*, photographers, the lessees and occupiers of the adjoining houses, Nos. 7 and 8, *Gloucester Terrace*, alleging that the business of the hospital as carried on by the Defendant was a noisome, obnoxious, and offensive trade, and that the user of No. 6 for the purposes of such hospital was an annoyance, grievance, and damage to the Plaintiff *Tod-Heatly*, and to the inhabitants of the neighbouring or adjoining houses and particularly to the Plaintiffs *Elliott &*

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Fry, and would grow to greater annoyance, nuisance, grievance, and damage.

Evidence of a conflicting character was given on both sides.

For the Plaintiffs—that the establishment, in a valuable residential quarter, of a hospital which attracted out-patients, mostly poor people of an objectionable class suffering from infectious diseases, was seriously depreciatory to the neighbourhood and had reduced its value for letting purposes.

For the Defendant—that there was not the slightest risk of infection, that as a matter of fact no patients suffering from infectious or contagious diseases had attended the hospital, that there was no crowding or loitering about of patients attending the hospital, nor had any complaint been made except by the Plaintiffs, and that the hospital supplied a want long felt and was a great benefit to the numerous poor in the district, and was well conducted, and in no sense a nuisance or annoyance within the meaning of the covenant. With respect to the alleged depreciation in letting value, it was stated that the houses in the immediate neighbourhood were by no means of a high class character, being let out in small shops, to chimney sweeps, jobbing tailors, greengrocers, and the like, while one of the adjoining streets was mainly occupied by lodgers of a questionable character.

The action came on for hearing before Mr. Justice *Kekewich* on the 15th of May, 1888.

Warmington, Q.C., and *A. Young*, for the Plaintiffs:—

This hospital is a business and it is a breach of the covenant: *Bramwell* v. *Lacy* (1); *Rolls* v. *Miller* (2); *Portman* v. *Home Hospital Association* (3). The evidence shews there is danger of infection. It is an actionable nuisance.

Barber, Q.C., and *Farwell*, for the Defendant:—

On the authorities this case is very near the line. No doubt this hospital is a business. The covenant, however, does not prohibit business altogether, but only a "noisome, obnoxious, or

(1) 10 Ch. D. 691. (2) 27 Ch. D. 71.
(3) 27 Ch. D. 81, n.

offensive trade or business." This distinguishes the case from *Bramwell* v. *Lacy* (1), where the covenant contained an absolute prohibition against any trade or business whatsoever. What is a "nuisance" cannot well be defined, and rests in each case upon the words of the covenant and the surrounding circumstances: *Ball* v. *Ray* (2); *Brand* v. *Hammersmith and City Railway Company* (3); *Harrison* v. *Good* (4); *Bamford* v. *Turnley* (5). It is not sufficient for the Plaintiffs to say "We are annoyed," they must shew that they are entitled to the benefit of the covenant, and that what is being done is a noxious, offensive business and an actionable nuisance within the covenant: *Walter* v. *Selfe* (6); *Sayers* v. *Collyer* (7); and we submit their evidence fails on these points.

A reply was not heard.

KEKEWICH, J.:—

If I were unfettered by authority, I should certainly call for a reply on a great part of this case, and find myself in a more difficult position than I do at present. I follow Mr. *Barber* in his observations that this is a case of considerable importance from many points of view, and I think also, as he pointed out, that it is a case on the border line. It is by no means to my mind free from difficulty, but I am going to decide it on what I believe to be the opinion of *Jessel*, M.R. (in *Bramwell* v. *Lacy*), which is directly applicable. Nuisance outside the covenant there is none. It has hardly been suggested, and certainly not proved. The question is one of the construction of the covenant, and before going further, it is right, having regard to the arguments, that I should say what I consider the construction of the covenant to be. In the first place, there is a covenant not to use or exercise certain trades or businesses. I think that does imply that a trade or business is not prohibited. The prohibition goes only to those trades

(1) 10 Ch. D. 691.
(2) Law Rep. 8 Ch. 467, 469.
(3) Ibid. 2 Q. B. 223, 247.
(4) Law Rep. 11 Eq. 338.
(5) 3 B. & S. 62, 79.
(6) 4 De G. & Sm. 315.
(7) 28 Ch. D. 103.

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or businesses which are actually specified, or to any other noisome, obnoxious, or offensive trade or business. I think the covenant contemplates that some trade or business would or might be carried on on the demised premises. Then as regards the second branch of the covenant it has been argued, and forcibly argued on behalf of the Defendant, that the intention must be to refer to something which is not a trade or business, because a trade or business is covered by the first part of the covenant. I think it is not grammatically so, and I do not think it is so on reasonable construction. The lessee covenants that he will do nothing which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, her heirs, or assigns, and it does not seem to me that there is anything unreasonable in saying that that includes a trade or business if it is an annoyance, nuisance, grievance, or damage, notwithstanding that a trade or business of that character may not have been prohibited by the first branch of the covenant. It is in the nature of a sweeping clause intended (perhaps it might have been left out altogether without injuring the effect, of at any rate the first branch of the covenant) to express more fully and in different language what is covered by the first branch, and possibly something else into the bargain. Then there is only one other point, and that is as regards the meaning of the words "annoyance, nuisance, grievance, or damage." I have nothing to consider here in the way of damage; no actual damage has been proved, and I am not called upon to assess damages, even if the word "damage" is restricted to a meaning of that kind. The question is whether there is an annoyance, nuisance, or grievance, and I think I may drop "grievance," as being a very difficult word to construe, and I see no occasion to make the attempt. I hold that there is a difference between "annoyance" and "nuisance." I concur in the argument that "nuisance" must be legal nuisance. *Harrison* v. *Good* (1) is an authority for that proposition, and it accords entirely with my view of the proper construction of the covenant, but I cannot accede to the argument that "annoyance is only another conveyancer's word for "nuisance." I think

(1) Law Rep. 11 Eq. 338.

it would be against the sound canons of construction to give the same meaning to the two words standing side by side, and I rather follow the suggestion that annoyance is a popular word for nuisance, "nuisance" being the legal technical word, while annoyance means something which, though frequently called a nuisance, is not a nuisance legally and technically, and therefore is popularly, but not technically, a nuisance. Then what sort of an annoyance is within the meaning of the covenant? I apprehend that the governing authority on that is *Walter* v. *Selfe* (1), and, without quoting again the oft-quoted words from p. 322, I may refer to p. 323, where V. C. *Knight-Bruce* says that the defendant's intended proceedings (brick burning) would, if prosecuted, "abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiffs' house." That passage and the other passages which have been read, I think explain exactly what is meant by annoyance in such a covenant as this. Now, I refer to the one point which, though I thought it desirable to make some remarks on the others, relieves me from further consideration of the case. In *Bramwell* v. *Lacy* (2), *Jessel*, M.R., had before him an action on a covenant almost in the same language as this—certainly, to my mind undistinguishable in substance from it. It was a covenant that the lessee would not exercise or carry on on any part of the premises any trade, business or dealing whatsoever (there was no limit there to what was noisome or offensive). It went even further, and said, "in the nature thereof without the consent in writing," and so on, "or be party to or suffer any act or thing which may be, or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises." The words I have in one covenant are, "annoyance, nuisance, grievance, or damage," and in the other, "annoyance, damage, injury, prejudice, or inconvenience;" the one word "nuisance" is left out, and that, for the reasons I have stated, can make no difference either way. *Jessel*, M.R., held there, that the hospital, which was one for the treatment of diseases of the throat and chest, was a business, and therefore a breach of the covenant, and that even if it were not a business —not that he doubted it—it was something

(1) 4 De G. & Sm. 315. (2) 10 Ch. D. 691.

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in the nature thereof, and therefore a breach of the covenant; and he might with propriety (I ought not to say more) have decided that and nothing more, and granted the injunction without considering the rest of the case. I observe, however, that the Master of the Rolls, before dealing with the business and the nature of the business, stated distinctly his own personal view respecting what might be infectious or contagious. He said (1) the hospital was one intended for the treatment of throat and chest disorders, "but it is well known" (this is his own evidence as a man of experience, and few men knew more of everything than the late Master of the Rolls) "that there are some throat diseases which are contagious; and, moreover, it is very possible that a patient on his first visit to the hospital might be found to be suffering from some disease of an infectious or contagious nature, and not from an ordinary throat or chest disease." Then after dealing with the business, and the nature of the business, he says, "The evidence appears to me to be sufficient to shew that the persons in the neighbourhood have already suffered annoyance, inconvenience, and injury, and that the possible danger from infection is a matter of which they have a right to complain." The possible danger of infection is what he has already mentioned, and what is referred to in the evidence. In this case I have at least as much evidence as the Master of the Rolls had, if I may properly accept the statement of the reporter, and what the Master of the Rolls stated himself. I have here proved that since the hospital has been opened persons have attended at the rate of some fifty or sixty a day, making altogether some 12,000 persons. I have evidence that on three days of the week they are attended for the throat, nose, ear, and the skin (I leave out the other days), so that taking it at a rough estimate some half the persons who have attended, some 6000 persons, in the last fourteen or sixteen months have been attended for diseases of this particular character. Now without quoting the evidence of any particular medical man who has been examined here, it may be assumed that these diseases may be the symptoms of, may lead to or may be the outcome of, infectious or contagious diseases. I suppose few of us are

(1) 10 Ch. D. 694, 695.

ignorant to what throat diseases not only may but frequently do lead. The diseases of the nose and ear, which perhaps are not so familiar, have been explained to us this morning, and we have been told that they may themselves, particularly the diseases of the nose, be contagious, and may be indications of some more serious disease of the system. The doctors attending this hospital are strong that the risk is infinitesimal, and they base their opinion upon this, that up to this time they have not observed one single case of infectious disease, or contagious disease, among the patients who have attended the hospital. It may be that they have been fortunate; that these patients have not come to them at that stage when they were suffering in such a manner that medical science would detect the presence of infectious or contagious diseases; but having regard to the experience of medical men, which has been proved by several witnesses, and to what the Master of the Rolls says is well known, it is impossible to suppose that, out of these numerous patients coming, day by day, none have been suffering from diseases which, whether at the moment of an infectious or contagious character or not, might on the next visit to the hospital —because one may assume that one visit would not always be sufficient—have developed into a disease either infectious or contagious. And if there are only fifty persons a day, three days a week, that is 150 persons in the week, brought into the immediate neighbourhood, some of whom may probably be suffering from contagious or infectious diseases, that seems to me to be evidence of possible danger from infection, and a matter of which the neighbours have a right to complain. As far as I can judge of the evidence in *Bramwell* v. *Lacy* (1), there is quite as strong evidence here as there was there, and I cannot but think that in their anxiety to uphold the hospital the doctors and members of the staff have gone rather far in support of their theory, and beyond what common experience has taught other medical men. The returns of the Metropolitan Asylums Board are against them. These reports are published, and they have been summarised and proved without reference to any particular records, but if they have been found to be incorrect, that can be easily set right.

(1) 10 Ch. D. 691.

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These matters have of late been inquired into narrowly, and particularly last year, and the returns of the Asylums Board compiled under those circumstances are extremely useful and valuable in such a case as this. I think there has been a breach of covenant in this, that the Defendant in establishing and carrying on this hospital has brought into the neighbourhood a possible danger from infection, sensibly larger than that which exists, as it always does exist, in the *London* streets. He has brought that possible danger nearer to the homes of the persons the Plaintiffs are seeking to protect, and in an aggravated form. I think that is a breach of the covenant. I think that is an annoyance or grievance. I simply hold it to be a grievance within the meaning of the covenant, and I think I should be disregarding the authority of *Jessel*, M.R., if I did not so hold. I conceive I shall be doing my duty in following what I understand to be the plain meaning and intent of the decision, which, so far as I am aware, has not been questioned for nine years. Therefore, the injunction must go as asked down to the words "human frame" in the eighth line of the prayer. I think it will be better to depart from what is the general rule of framing the injunction on the words of the covenant. I think it would be better here to follow the words in the statement of claim which themselves follow the advertisement of the hospital, so that there shall be no doubt on the face of the Court's judgment of what is sought to be restrained. I must order the Defendant to pay the costs of the action.

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From this decision the Defendant appealed. The appeal came on for hearing on the 26th of October, 1888.

Barber, Q.C., *Farwell* and *Gross*, for the Appellant:—

We do not dispute that this is a business, but the covenant here does not prohibit the carrying on any business whatever, and the covenantee must make out that it is a "noisome, obnoxious, or offensive" business, or that it is a matter which "is or may be or grow to the annoyance, nuisance, grievance or damage" of the lessor or the inhabitants of the neighbouring or adjacent

houses. In *Bramwell* v. *Lacy* (1), on which Mr. Justice *Kekewich* relied, it appears (2) that some of the patients were suffering from infectious or contagious diseases; here the evidence is that there is no danger of infection. There is no more annoyance here than there would be in having a general medical practitioner next door. The words, "neighbouring or adjoining" cannot apply to any property except parts of the same estate: *Harrison* v. *Good* (3). The state of the property at the time when the covenant was entered into must be looked at: *Gutteridge* v. *Munyard* (4). There were only little shops at the time, and it cannot have been intended that the occupant of a beershop should have a right to complain of such a use as this house is now being put to. This is not the case of a covenant not to do some particular definite act; in such a case the Court will look no further, but prevent it. This is a covenant not to do anything which shall be an annoyance or damage, and a mere sentimental annoyance cannot be regarded, or else the decision would depend, as has been said, on the length of the judge's foot.

[COTTON, L.J.:—Suppose the annoyance to be a matter of sentiment. Still if the sentiment is one which ninety-nine people out of every hundred would share is not the act an annoyance?]

We submit that there must be some tangible ground of annoyance shewn.

[COTTON, L.J., referred to *Walter* v. *Selfe* (5).]

That was a case of legal nuisance; here the Judge below, following *Harrison* v. *Good* that nuisances must mean legal nuisances, has rightly found in our favour that there is no nuisance.

Then we submit that there has been no breach of covenant even against annoyance. The Plaintiffs have certainly suffered no pecuniary damage nor, even theoretically, any risk, as, upon the evidence, there has not been a single case of infectious disease amongst the patients attending the hospital, nor has any crowd

(1) 10 Ch. D. 691.
(2) Ibid. 692.
(3) Law Rep. 11 Eq. 338.
(4) 7 Car. & P. 129.
(5) 4 De G. & Sm. 315, 322.

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of people to the disturbance and annoyance of the neighbourhood been caused by the opening of the hospital. The annoyance therefore is merely sentimental, and not such as to justify the interference of the Court.

Rigby, Q.C. (*Warmington*, Q.C., and *A. Young* with him), for the Respondents:—

[COTTON, L.J.:—We only wish to hear you upon the question whether this hospital is an annoyance or grievance within the second part of the covenant to the lessor, her heirs and assigns, or to the inhabitants of the neighbouring or adjoining houses.]

Anything which reasonable and sensible people may reasonably put forward as a ground of objection, or of which they can fairly complain as an interference with the pleasurable enjoyment of life, is an annoyance or grievance within the meaning of the covenant. The restriction is not to be limited to that which is an annoyance to persons residing on the lessor's estate, but includes the neighbourhood; and that the establishment of this hospital is an annoyance to the neighbourhood is shewn by a protest, signed by residents and owners of property in the neighbourhood, against it as being an annoyance and damage to them.

Upon the medical evidence, in considering which the natural bias in favour of a hospital like this must be regarded, we have independent testimony that there is not only a theoretical but a practical risk. The objection therefore cannot be said to be purely sentimental.

[He was stopped.]

Barber, in reply:—

Accepting the ruling that it is not necessary for the Plaintiffs to prove pecuniary damage, the question as to the proper construction of the covenant still remains. Some good reason must be shewn for the feeling of annoyance. It is not sufficient for the Plaintiffs to say that they feel annoyed and aggrieved by the establishment of the hospital; while as to the risk it is merely imaginary, as out of 12,000 persons who have attended the hospital there is no evidence of a single infectious case.

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We have been much pressed in this case on behalf of the Appellant that this is a question of nuisance, and that we are to consider whether or not a case of nuisance had been made out. But that is not so. It is a question on the covenant. The predecessors in title of the Defendant took the property from the predecessors of the Plaintiff *Tod-Heatly* under a certain covenant, and the only question we have to consider is whether that which has been done by the Defendant is in violation of that covenant. If that is made out the Court does not in my opinion require the Plaintiffs to shew that there is any damage or pecuniary loss sustained by them. There is a contract between the parties, and there being nothing wrong in the bargain, the Plaintiff *Tod-Heatly* has a right to insist upon the price in consideration of which the Defendant's predecessors got the property. As was very fairly and properly admitted, the Defendant, although he did not personally know of this covenant, as unfortunately he did not, must be taken to have known of it, and he must not use the property in any way in violation of the covenant.

No doubt the Defendant and those who are associated with him are doing what they think is very beneficial for the poor people residing round about the place; and, as far as we can judge, it will be a great benefit to them to have the house used in this way on the basis upon which it has been taken. But we have nothing at all to do with that; we have only to put the true construction upon the covenant by which the Defendant is bound. Now the covenant divides itself into two parts. The first part restrains the lessee from carrying on certain trades, "or any other noxious or offensive trade or business without the license of the lessor." The case does not come within that, and I only refer to it for this reason, that it was contended that what was being done by the Defendant was a trade, and that as it does not come within the express provision against such a trade he ought not to be restrained, although it does come within the words of the latter part of the covenant, and is "an annoyance, nuisance, grievance, or damage," and that it would be wrong, on the true construction of the covenant, for the Court to interfere. But in my opinion that is wrong. The latter part of the cove-

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nant applies to everything which can be in any sense "an annoyance, nuisance, grievance, or damage," even though the business carried on by the Defendant is not one of the noxious or offensive trades specified or within the first part of the covenant.

What we have to consider is whether what is done by the Defendant does come within the latter part of the covenant [to which his Lordship referred]. Now I first of all strike out the word "nuisance." It was argued that this word would give a colour to the whole, and reliance was placed, as I understand, on the decision of V.-C. *Bacon* in *Harrison* v. *Good* (1). But there the only word which V.-C. *Bacon* had to deal with was the word "nuisance"; and he expressly decided that case upon that ground. I can only say that I express no opinion upon the construction put by the Vice-Chancellor upon the covenant before him, and I say this because it might be otherwise said that I referred to it in this case and did not express disapproval, and therefore that I approved of it. I give no opinion, and I do not express any approval. I doubt much whether the covenant here ought to be construed as if the thing to be prohibited must be a nuisance or anything that is a legal nuisance. I pass by that. Here we have those other words, "annoyance," "grievance," and "damage." It was contended that nothing can come within the words "annoyance or grievance" unless it involves that which has been proved and shewn on the part of the Plaintiffs to cause a money loss. I must express my dissent from that. Damage may require in some degree to be measured by pecuniary loss, but in my opinion many things may be, within the meaning of this clause, an annoyance or grievance to the owners of this property or the inhabitants of the neighbouring or adjoining houses, although no pecuniary loss can be shewn as resulting from the acts complained of. If it were necessary to enter into the question I do not think I should agree with Mr. Justice *Kekewich* in the view he took that, on the evidence, no pecuniary loss whatever was sustained. In my opinion the difficulty in letting, and the difficulty in selling houses seems to involve a pecuniary loss. But I do not enter into that question: it is

(1) Law Rep. 11 Eq. 338.

unnecessary in my opinion to do so; and I proceed to the question whether there was annoyance or grievance within the meaning of the latter part of the covenant. I will not give any opinion as to how far, without these words, the covenant may have protected the whole of the property which apparently at the time was let out in building lots, and to various builders. I do not express any opinion whether the covenant would, without the added words, affect the whole estate, but having regard to the added words "or to the inhabitants of the neighbouring or adjoining houses," the covenant, in my opinion, is not confined to property belonging to the lessor as reversioner, but applies to other property also. And if any act done by the Defendant really amounts to a grievance to the inhabitants of houses not only on this but on the adjoining property, that, in my opinion, is prohibited by this covenant. To my mind that must be so. The lessor has put in a covenant in order to protect his building estate. Now it must be obvious that if anything is done which will interfere with or be a grievance to the inhabitants of the adjoining houses so as to depreciate the property and cause it to be let to and occupied by an inferior set of tenants, or if the adjoining houses remain unoccupied, or are in any way affected by the grievance or annoyance, these are matters which will react upon the lessor's property; and therefore I differ from Mr. Justice *Kekewich* in saying that one can only regard such damage, annoyance, or grievance as is caused to the inhabitants of the houses on the Plaintiffs' (the lessor's) own property.

Then comes the question whether there is an annoyance or grievance either to the adjoining houses or to the houses on the property in question. Now "annoyance or grievance" are words which have no definite legal meaning. It has been pressed upon us that we cannot say that it was that which was an annoyance or grievance to reasonable people, because the Judges, in speaking of what would be an annoyance to reasonable people, are only speaking of what they themselves really think would be an annoyance or grievance. That is the difficulty that Judges very often have to deal with; they must not take that to be an annoyance or grievance which would only be so to some sensitive persons. They must decide not upon what their own individual

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thoughts are, but on what, in their opinion and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people; and, in my opinion, an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance, and within the definition given by V.-C. *Knight-Bruce* in *Walter* v. *Selfe* (1). It is not sufficient in order to bring the case within the words of the covenant, for the Plaintiffs to shew that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done. In my opinion, it is not necessary in order to shew that there has been reasonable ground for annoyance or grievance, to prove absolute danger or risk of infection. In my opinion a reasonable apprehension of nuisance from acts done by the Defendant is a matter which will produce such interference with the pleasurable and reasonable enjoyment of the adjoining houses as to come within the words "annoyance or grievance"; not that any particular person is annoyed or aggrieved, but that there is annoyance or grievance to persons who entertain reasonable views. Now what has been done here? A large number of people have been brought to that hospital, some of whom certainly have had contagious diseases, but they are said not to have had infectious diseases. Diseases may be communicated by contagion, and I see nothing to prevent the servant of a family running against some one going to this hospital who has a contagious disease, and possibly taking it into the house of his or her employer in the neighbourhood. Certainly, I think it cannot be said that there is no reasonable fear, no reasonable apprehension of risk from other people meeting the patients coming to the hospital. I do not go into or criticise the evidence of the doctors. Some have been called on behalf of the Plaintiffs, who state their views and point out what they think may be a case of nuisance. Even if they do not make out that there is really risk, yet the expression of their opinions shews that persons residing in the neighbourhood, those who go to *Elliott & Fry's*, or those who are or may be prevented from having

(1) 4 De G. & Sm. 322.

their photographs taken there, and the inhabitants of adjoining houses in *Gloucester Terrace*, might reasonably apprehend risk in consequence of those patients being brought there. It is said that in walking along the *Strand* there is just as much risk as is run by the people here. Possibly that may be so. I do not know. In *London* (speaking for myself) one does not think so much of the risk as people living in the country do. But this is bringing to a centre in the immediate neighbourhood of these houses people, some of whom have contagious diseases, some of whom, there is reason to believe, have diseases that are possibly infectious. In my opinion, having regard to the evidence of the doctors on both sides, it cannot be said that the apprehension of risk from this hospital being carried on is unreasonable. There has been, therefore, a violation of the covenant, and the appeal must be dismissed.

LINDLEY, L.J.:—

The question which arises is, what is the meaning of the expression "shall or may be or grow to the annoyance, nuisance, or damage" of the persons named. Certainly that string of words is introduced in order to give the covenantee a greater protection than he would have had without any such words at all, or if only one of those words were used. There is no use in putting in the words "any grievance or damage" as additions to nuisance except for the very purpose of giving some greater protection than he would have had if the word "nuisance" alone were used and included in the covenant. When V.-C. *Bacon* held, as he did in *Harrison* v. *Good* (1), that the word "nuisance" in the covenant meant only that which would be an actionable nuisance without the covenant, I doubt whether he gave sufficient weight to the consideration that the whole object of having a covenant against nuisance is to give the covenantee some protection in addition to what he would have had without the covenant; but for a nuisance in the strict sense there would be an action, covenant or no covenant. I am not by any means sure that the Vice-Chancellor did not put on the word "nuisance" in that covenant too restricted an interpretation.

(1) Law Rep. 11 Eq. 338.

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But be that as it may, I cannot at all agree with the contention that these words "annoyance or grievance to the inhabitants" mean that which would be according to law a nuisance, or that the covenant is only against such acts as would produce pecuniary damage. If it were necessary to consider this question of damage, I confess the inference I should draw from the evidence is that pecuniary damage is made out. I think that is the legitimate inference, but I do not rely upon that at all. I will assume that Mr. Justice *Kekewich*, who saw the witnesses, is correct in that; and his opinion clearly was that there was no pecuniary damage whatever. I will assume that to be so. Still we come back to the question whether that which has been done is not within those words, "such as shall cause or may be or grow to the annoyance or grievance of the lessor." Now what is the meaning of annoyance? The meaning is that which annoys, that which raises objections and unpleasant feelings. Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant. Then to whom is it to be an annoyance? It must be to "the lessor, her heirs or assigns," or the inhabitants of the adjoining houses; the lessor is represented by Mr. *Tod-Heatly*, the owner of the reversion of this property. In this case he says: "It is not because I live there, but because my tenants come to me and complain, and it gives me trouble and vexation, since what annoys them is a trouble and vexation to me." But the under-tenants, are they not annoyed? Is there nothing done here which raises an objection on their part, looking at them as reasonable beings? Is it a fanciful feeling of distaste? I must say at one time I thought that the Appellant might succeed in shewing that there was really nothing to complain of here except fanciful annoyance to the proprietor and to the inhabitants of the adjoining houses. It struck me there might be some doubt whether there was any annoyance to the neighbouring or adjoining houses—more than some fanciful distaste, which would not be sufficient. But upon the evidence I am satisfied that what has been done really does annoy a great many people on this estate. It appears to me to be unnecessary to decide whether the doctors on the Defendant's side are right in saying that there is nothing to be

afraid of, or whether the evidence on the other side is right that something is to be feared. It is quite enough, as it appears to me, to establish that reasonable men are satisfied that serious risk is incurred, and that they reasonably believe there is serious risk. That is an annoyance to the neighbours, and the case is that that is an annoyance against which the lessor has taken the precaution to protect himself by a special bargain. I do not mean to say whether this hospital is or is not a nuisance. The question is, what extra protection this lessor is entitled to, and whether he has been deprived of that extra protection by the Defendant? Looking at the case in that point of view I think the case is made out; and that this appeal ought to be dismissed.

BOWEN, L.J.:—

I am of the same opinion. It is quite clear that we have not to decide the question whether this hospital is a nuisance at Common Law. If it had been placed on any land unfettered by any contractual obligations, I think there is nothing in this evidence to justify us in holding that it could be said to be a nuisance at Common Law at all. But that is not the question. Here there has been a special bargain that on that particular plot of ground there shall be nothing placed which is to lead or grow to the annoyance of the lessor or of the inhabitants of the neighbouring or adjoining houses.

Now, all we have to consider is, on the evidence before us, whether this hospital is a thing which is an annoyance to the lessor or to the inhabitants of the neighbouring or adjoining houses. What is the meaning of the term "annoyance"? It implies more, as it seems to me, than "nuisance." The language of the covenant is, that nothing is to be done, "which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor or the inhabitants of the neighbouring or adjoining houses." Now, if "annoyance" meant the same thing as "nuisance" it would not have been put in. It means something different from nuisance. If guided strictly by the Common Law, we know what nuisance is. Whether the term is employed in the covenant in the exact sense of the term at Common Law or

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not, is a matter that may be doubted, but I will assume as matter of argument only, that "nuisance" in this covenant means only a nuisance at Common Law: that is in the language of Vice-Chancellor *Knight-Bruce* in *Walter* v. *Selfe* (1) "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people." Any material interference with the ordinary comfort of existence: that would be a nuisance. The law, in thus defining "nuisance" has stopped short, I will not say of protecting the fancies of people, because the mere fancies of people I do not think can in any view be an element in the definition, but has stopped short, according to what is said in *Aldred's Case* (2), of giving an action in respect of that which is a matter only of delight, and not of necessity. "Annoyance" is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort. You must take sensible people, you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case. Doctors may be able to say, and, for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighbourhood. But the fact that some doctors think there is makes it evident at all events that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for an ordinary person who lives in the neighbourhood to be troubled in his mind by the apprehension of such risk, it seems to me there is danger of annoyance, though there may not be a nuisance. As the Lord Justice *Cotton* has said, the very opinions of the doctors called on behalf of the Plaintiffs to the effect that there may be a risk, even if they are wrong in thinking there is risk, shew that it is not at all events unreason-

(1) 4 De G. & Sm. 322.

(2) 9 Rep. 58 b.

able for less skilled and competent persons to think so. The measure is what is reasonable enjoyment of a man's premises—not according to the estimate given by skilled doctors as to the effect of an hospital, but according to what ordinary people, who are not skilled doctors, may think it.

Now the strong part of the evidence, as it seems to me, is that in this place are collected during every afternoon for two or three hours a number of poor people more or less suffering from disease. It is said that nobody has ever gone to apply for assistance, even by inadvertence, who has had an infectious disease. That may be so, but if so, the hospital has been very fortunate. Poor ignorant people who are suffering from certain diseases are collected there, and it appears to me not unreasonable that the neighbourhood should be apprehensive as to consequences; and if the neighbourhood is reasonably apprehensive as to the consequences, the matter, I think, comes within the covenant.

I agree with what Lord Justice *Cotton* said as to the construction to be put on the terms "inhabitants of the neighbourhood" and "adjoining houses," that the application of these words cannot be confined to the lessor's own property. Of course in every case it is a question of construction of the particular document. It might appear from the context that "adjoining houses" was only intended to apply to houses which belonged to the lessor; but if there is nothing in the context to shew it, why should we read in any such words? That which according to the reasonable view of the thing depreciates the neighbourhood depreciates the house itself. I ought to add that I entirely agree with what Lord Justice *Lindley* said, and in this particular case, though it be not necessary to shew pecuniary damage, I doubt very much whether I should draw the inference which Mr. Justice *Kekewich* has drawn, that no pecuniary damage has been shewn.

Appeal dismissed with costs. Injunction to come into operation on the 1st of December.

Solicitors: *Prior, Church, & Adams; Last & Sons.*

F. G. A. W.

C. A. 1888 Nov. 6, 7, 9.

LONDON, CHATHAM AND DOVER RAILWAY COMPANY *v.* SOUTH-EASTERN RAILWAY COMPANY.

[1885 L. 3267.]

Railway Company—Arbitration—Jurisdiction—Waiver of Right to insist on Arbitration—Railway Companies Arbitration Act, 1859 (22 & 23 *Vict. c.* 59), *ss.* 4, 26 [*Revised Ed. Statutes, vol. xiii, pp.* 545, 547].

Where railway companies have entered into an agreement to submit matters in dispute to arbitration, under the provisions of the 4th and 26th sections of the *Railway Companies Arbitration Act*, 1859, it is obligatory on the Court to give effect to the agreement for arbitration if either of the parties insist on it; but the Court is not deprived of its jurisdiction to determine the matters in dispute if neither party insists on an arbitration. And in a case where the defendant had in his pleadings insisted on his right to arbitration, but had failed to raise the point at the hearing, and had gone into evidence on the merits, the Court of Appeal refused to allow the point to be raised on the appeal.

THE action in this case was brought by the *London, Chatham and Dover Railway Company* against the *South-Eastern Railway Company*, for the purpose of deciding certain questions that had arisen between the two companies under an agreement dated the 7th of September, 1865.

By that agreement the two companies agreed to bring the receipts from the "local traffic," that is, the traffic by rail between *London* and *Folkestone* and *Dover*, and the steamboat traffic between *Folkestone* and *Dover* and the Continent, and also the receipts from the continental traffic, that is the traffic between *London viâ Folkestone* and *Dover* and the Continent, into a common fund, and to divide it between them in the proportions therein mentioned.

By clause 17 of the agreement it was provided that certain questions should be decided by a referee thereby appointed.

Clause 28 was as follows:—

"All questions and matters of difference between the two companies for the settling of which by the referee special provision is not otherwise herein made, shall be referred and be determined by arbitration as provided by the *Railway Companies Arbitration Act*, 1859."

A dispute arose between the two companies respecting the traffic between *London* and the *Shorncliffe* and *Radnor Park* stations near *Folkestone*, the *London, Chatham and Dover Railway Company* contending that the traffic to those two stations was traffic between *London* and *Folkestone* within the meaning of the agreement, and ought to be brought into the common fund for division, which the *South-Eastern Railway Company* refused to do. The present action was therefore commenced to decide that question.

The *South-Eastern Railway Company*, by their statement of defence, denied the validity of the agreement, and contended that even if it should be held valid, all questions and matters of difference thereunder ought to be determined by arbitration, as provided by the *Railway Companies Arbitration Act*, 1859.

They also put in a counterclaim for a proportion of the receipts from the traffic between *London* and the Continent conveyed by the Plaintiffs by their new route by *Queenborough* and *Flushing*, as coming within the terms of the agreement as to continental traffic.

The question of the validity of the agreement was decided by Mr. Justice *Chitty* in favour of the Plaintiffs, and that decision was affirmed by the Court of Appeal on the 31st of July, 1886, the Lords Justices holding that the Court had jurisdiction to determine the question of the validity of the agreement, and that the agreement was valid. The Defendants appealed to the House of Lords, who affirmed the judgment of the Court of Appeal on the 14th of May, 1888; but their Lordships expressly stated that the judgment of the House of Lords, and also the judgment of the Court of Appeal, only decided that the High Court of Justice had jurisdiction to try the question of the validity of the agreement, and did not decide the question whether the matters in dispute arising under the agreement ought to be tried by arbitration.

On the 16th of November, 1887, before the appeal to the House of Lords had been heard, the action came on for trial before Mr. Justice *Kekewich*. The Defendants did not then insist on their objection that the questions ought to be decided by arbitration under the *Railway Companies Arbitration Act*, being under the

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impression that the Lords Justices of Appeal had, on the previous hearing, decided that the Court had jurisdiction to determine all the questions in dispute between the parties in the action. They therefore argued the question in dispute on the merits, and produced evidence in support of their contention. His Lordship held that the two stations of *Shorncliffe* and *Radnor Park* were properly included under the term *Folkestone*, and that the *South-Eastern Railway Company* was bound to account for the traffic between *London* and those stations. He also dismissed the Defendants' counter-claim respecting the traffic to the Continent by *Queenborough* and *Flushing*.

From this decision the Defendants appealed.

Sir *R. Webster*, A.G., *Seward Brice*, Q.C., and *C. T. Mitchell*, for the Appellants:—

We contend, in the first place, that the Court had no jurisdiction to decide the questions of dispute arising out of the agreement of 1865. It is true that we did not rely upon this point in the Court below, because it was there understood by both parties that the Court of Appeal had decided that the jurisdiction of the High Court of Justice was not ousted in this action; but it now appears from the judgment of the House of Lords that the point of jurisdiction was still open.

Romer, Q.C., and *Haldane*, (Sir *Horace Davey*, Q.C., and *Pope*, Q.C., with them,) for the Plaintiffs:—

It is now too late for the Appellants to raise this objection. They did not raise it at the trial, but on the contrary submitted to the jurisdiction of the Court, and called their witnesses in support of their case. They took the chance of obtaining judgment in their favour on the matter in dispute; and they are now debarred from objecting to the jurisdiction of the Court.

Sir *R. Webster*, A.G., *Seward Brice*, Q.C., and *C. T. Mitchell*, for the Appellants:—

Our omission to raise the point at the hearing is explained by the fact that we considered that the point had been decided by the Court at the previous hearing. It was raised in our pleadings,

and cannot therefore be waived or abandoned. It is the duty of the Court to take notice of it whenever it is brought to its notice. The words of the 4th and 26th sections of the *Railway Companies Arbitration Act*, 1859 (22 & 23 Vict. c. 59) (1), are clear. The effect of the Act is to oust the jurisdiction of the Court to deal with the matters in dispute: *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (2); *Watford and Rickmansworth Railway Company* v. *London and North Western Railway Company* (3).

[LINDLEY, L.J., referred to *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Company* (4).]

COTTON, L.J.:—

We have to decide on a preliminary objection against the Appellants raising one point on which they rely, namely, that the Court has no jurisdiction to enter into these questions, and therefore that the judgment of Mr. Justice *Kekewich* ought to be discharged, and the matter ought to be referred to arbitration.

There was an agreement between the two railway companies under the authority of an Act of Parliament, which contained a provision that all matters in difference between them should be referred to arbitration under the *Railway Companies Arbitration Act*. Two sections in that Act have been referred to, and as there is no decision on the subject which binds us it is right for us to express an opinion as to what the true effect of these sects. 4 and 26 is. [His Lordship read the sections.]

Now what is the effect of the 26th section? It no doubt

(1) 22 & 23 Vict. c. 59, s. 4: "Every reference or agreement in accordance with this Act, except so far as it is from time to time revoked or modified in accordance with this Act, shall bind the companies, and may and shall be carried into full effect."

Sect. 26: "Full effect shall be given by all the superior Courts of law and equity in the *United Kingdom*, according to their respective jurisdiction, and by the companies respectively . . . to all agreements, references, arbitrations and awards, in accordance with this Act."

(2) Law Rep. 2 H. L., Sc. 347.

(3) Ibid. 8 Eq. 231.

(4) Ibid. 16 Eq. 433.

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requires the Court when either of the parties to the agreement insists upon it, to give effect to, and to act in accordance with the agreement so far as regards the submission to arbitration, and it has reference to this: that in former days where there was a voluntary agreement—an agreement not under an Act of Parliament—the Court said, "We will not enforce an agreement between parties to withdraw a matter which is properly matter within our jurisdiction from us, and refer that matter to a private judge or to an arbitrator." But in my opinion that section in no way deprives the Court of its jurisdiction. All that it does is this. It renders it the duty of the Court when either of the parties to an agreement for arbitration under this Act insists upon it, to give them an order in accordance with this clause. If they say, "There is an agreement made with our opponents that this matter shall not be tried before the Court, but shall be tried before an arbitrator, and we require the Court to give full effect to that," it makes it I think obligatory upon the Court to order the case to be withdrawn from the Court; but in no sense does it deprive the Court of jurisdiction. Though there be such an agreement, in my opinion the Court has full jurisdiction; and if neither of the parties insists on the agreement, it would be the duty of the Court to go on with the matter which is properly within its jurisdiction, and to hear it in the ordinary course, and decide it. That I take to be the proper construction of those sections.

Now what has been done here. The case came on before Mr. Justice *Kekewich* at a time when there was an appeal pending before the House of Lords, one of the questions being, if the agreement was a good one, whether the jurisdiction of the Court was ousted. Whatever may have been the decision, or whatever may have been the view entertained by the parties as to the decision, the point whether our decision was right was before the House of Lords; and though an application was made to the Judge to postpone the trial of this action, because certain other points decided by us which had gone to the House of Lords, would be material, yet so far as I can see, this point,—namely, that the Defendants desired to insist on their contention that the Court has no jurisdiction to interfere in these questions, and that they ought to be referred to an arbitrator, which point might be

decided by the House of Lords in their favour, and therefore that they ought not to be put to the trial of this action until the House of Lords had decided on that contention—was not taken; and the application which was made, was made on the footing that the parties intended to ask the Court to come to a decision on the merits as to these disputes which they now say ought to be referred to an arbitrator. Then when it came before Mr. Justice *Kekewich*, I will assume that it was supposed that our decision was one more extensive than the House of Lords said it was; but even then the Defendants did not say, "While the decision in the House of Lords is pending we cannot contend that this point ought to go to an arbitrator, but we do not abandon it, we still desire to keep it open;" but they go on with the trial and they get the judgment of a Court upon the evidence on the question which they now say the Court ought never to have entertained. In my opinion parties ought not to be allowed to do that. If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object to the jurisdiction of the Court which they might have had if they had insisted on it in a proper way and at a proper time.

Then three cases have been referred to. I need not deal with the case of *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1), but I will refer to *Watford and Rickmansworth Railway Company* v. *London and North Western Railway Company* (2). There one of the parties was insisting on the agreement, and insisting that under that agreement he had a claim by virtue of the Act of Parliament. That is entirely different from the present case. In that case Lord *Romilly* does not use any expression about the jurisdiction of the Courts being "ousted." I think he says something about its being excluded; but although there may be that casual expression, in my opinion that does not amount to any decision that the Court has no jurisdiction to try the case, if the parties do not insist upon an arbitration.

(1) Law Rep. 16 Eq. 433. (2) Law Rep. 8 Eq. 231.

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Then there is the case before the House of Lords of the *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (1). There, again, one of the parties by his plea insisted on his right under the agreement to withdraw the case from the jurisdiction of the ordinary Courts. It is true that Lord *Cairns* uses some expressions which do a little support the contention of the Appellants; but then they were used with reference to the case before him; and although I think it would be more accurate to say that when one of the parties insists on this objection, the Court ought to give effect to it by declining to entertain the matter, yet he does speak about the jurisdiction of the Court being excluded. That, in my opinion, with the greatest respect to Lord *Cairns*, whose language as a rule was most accurate and most definite, does not correctly describe the position which we now have to deal with, where, the objection not having been taken at a time when it ought to have been taken, it is sought to be raised afterwards; and when the party, not insisting on his right, has sought to get a decision of the Court on the merits of those questions which he now contends ought to go to an arbitrator.

There is nothing, in my opinion, in that decision in the House of Lords, when one considers fairly the expressions used by Lord *Cairns*, which entitles us, or requires us, to yield to the argument of the Attorney-General. I think on this point the preliminary objection taken by the Respondents must prevail.

LINDLEY, L.J.:—

I am of the same opinion, and have very little to add. I cannot let the case pass without observing that I do not think the construction contended for by the Attorney-General of the *Railway Companies Arbitration Act*, 1859, is the correct one. He invites us to go so far as to say that, if two railway companies enter into an agreement, that all differences shall be submitted to arbitration and decided under the Act I have mentioned, the Court is bound to take notice of that agreement, and not to deprive the railway companies of any rights acquired under it.

(1) Law Rep. 2 H. L., Sc. 347.

I do not think sects. 4 and 26 of that Act should be read or have been read as going to that extent. They give either railway company a right to insist on going to arbitration under the Act, and to exclude the case from the jurisdiction of the Courts; but to say that the Court has no power to determine the dispute if the parties waive their right is quite another matter. Having regard to the course which was adopted in the Court below, I think the Defendants must be treated as having waived this objection in the Court below, and it would not be right for us to entertain it on appeal.

BOWEN, L.J.:—

I am of the same opinion. I do not think that the true construction of the Act of 1859 is that, where there is an agreement to refer under the Act between two railway companies, the Courts of this country become incompetent to try the cases which arise with regard to disputes between the two companies, or that the jurisdiction of the Court is ousted.

We must bear in mind exactly what was the state of the law at the date at which the Act of 1859 was passed. Originally, as we all know, with regard to voluntary agreements between individuals, where the parties to the contract had made bargains between themselves that the matters which arose between them as disputes should be referred to arbitration, the law refused to allow either of the parties to such an agreement as that to enforce it by way of plea in bar to an action, or by way of injunction against an action brought before the Courts of this country. They said they would not give effect to such an agreement, the consequence of which would be, if it was enforced, to put an end to the jurisdiction of the Courts, and to substitute for them a conventional jurisdiction of arbitration.

Then came the *Common Law Procedure Act* of 1854, which modified that state of the law, but only to a certain extent. Sect. 11 enabled the Court, if it thought right, on application at a particular stage by one of the parties to such agreement, to stay an action brought by the other upon terms, the terms imposed being, amongst others, that the arbitration clause should be proceeded with, but the Legislature still left it as between

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individuals, in the discretion of the Courts, how far they would enforce such an agreement.

Then came the Act of 1859 for railway companies; and it seems to me that the object of the Act was to remove the difficulty with regard to railway companies which up to that moment had existed, and to leave it in the power of railway companies to agree between themselves, if they so chose, that their disputes should be referred to arbitration, and that either party should have the right to enforce that agreement against the other party, and to prevent the party who sought to depart from it from having recourse to the Courts of Law in the face of the bargain that arbitration should be the proper tribunal. But that seems to me to be nothing more than legislation which places it in the power of railway companies to insist upon that contractual right as against each other, if they choose to make a bargain to that effect, and to fall far short of legislation which debars the Courts of this country from deciding disputes between railway companies if the railway companies themselves do not choose to insist upon the arbitration clause in their agreement. I hardly think it can be law that when two railway companies have made an agreement to this effect, the Courts of this country may not try a dispute which arises between them if neither of the parties desire to insist on the arbitration clause. The truth is, I think, that these sections of the Act do nothing more than give true and full effect to the clause in the agreement which provides for arbitration. A clause in the agreement, which provides for arbitration, if couched in language like the present, is not an agreement that the Courts shall never be at liberty to try, but an agreement, in effect, that either party may insist on arbitration if he chooses to do so; and you give full effect to that agreement if you hold that the true operation of the section is to make it obligatory on the Courts to grant the right, if the right is asserted at the proper time, and to give effect to the agreement in that way, but not to deprive the Court of jurisdiction to try a case when neither party takes the point.

Then it was said that the Attorney-General's position was fortified by the language of Lord *Cairns* in the case of *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Com-*

pany (1). Lord *Cairns* does from time to time use language which appears to favour the view that the provision as to reference was obligatory on the company. I neither desire to contest any decision of the House of Lords, nor to endeavour to escape from it by subtle distinctions of language, but I cannot believe, on reading the case carefully, that Lord *Cairns* meant to decide or meant to indicate his own opinion to the effect that the jurisdiction of the Courts was ousted. I think his language must be taken *secundum subjectam materiam*. That was a case in which, from the first, one of the companies had insisted on this right; and Lord *Cairns*, whenever he uses language to the effect that the Act of Parliament is obligatory, and that the parties are forced to have their disputes settled by a reference to arbitration, and not by the ordinary tribunals of the country, is, I think, dealing with a case where one of the parties is asking for, and the other refusing, the right which Parliament had said should be granted. In the same way, I think, the language of Lord *Romilly* must be read in the case of *Watford and Rickmansworth Railway Company* v. *London and North Western Railway Company* (2). I agree with the Lord Justice that here, if the point had been taken and insisted upon from the first, there might have been no answer to it; but, at all events, when the point is not taken from the first, it is to be treated as having been abandoned in that way; and when a point such as this is waived and not insisted upon, the Court is not compelled at any stage of the litigation to go back and treat the parties who have waived it as parties who have not done so.

1888. Nov. 9. The appeal was afterwards heard on the merits, when their Lordships affirmed the decision of Mr. Justice *Kekewich*, both as to the claim and the counter-claim, and dismissed the appeal with costs.

Solicitors for the Plaintiffs: *C. & S. Harrison & Co.*
Solicitor for the Defendants: *W. R. Stevens.*

(1) Law Rep. 2 H. L. Sc., 347. (2) Law Rep. 8 Eq. 231.

M. W.

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MARSLAND *v.* HOLE.

[1884 M. 2489.]

Practice—Time for appealing—Order on further Consideration and Summons to vary Certificate—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15*a*.

A cause came on for further consideration and on summons to vary the Chief Clerk's certificate. An order dismissing the summons and an order on further consideration were drawn up separately, bearing the same date. About four months afterwards a party gave notice of appeal against both orders, and the objection was taken that the appeal from the dismissal of the summons was out of time:—

Held, that the two orders were in substance one order, and that the appeal ought to be allowed to proceed.

IN this case judgment had been given directing an account of what was due to the Plaintiff in respect of a rent-charge payable out of a settled estate and secured by a term limited to trustees, and an account of rents and profits received by the trustees. At this time no one was a party as representing the inheritance.

The accounts were taken and the cause came on before Mr. Justice *Kay* for further consideration on the 20th of April, 1887, and on a summons by *Ogle*, a mortgagee of certain shares in the inheritance, for liberty to attend the proceedings. Mr. Justice *Kay* made an order giving *Ogle* liberty to defend the action on behalf of the persons interested in the estate subject to the rent-charge, with liberty to surcharge and falsify the accounts which had been taken, and the further consideration was adjourned.

The Chief Clerk on the 1st of February, 1888, made his further certificate finding £111 7*s*. due from the trustees, and adhering to his former certificate as to the amount of arrears due to the Plaintiff. *Ogle* took objections to the certificate as to both accounts, and took out a summons to vary it, which was adjourned into Court and came on with the hearing for further consideration.

On the 12th of March, 1888, Mr. Justice *Kay* made an order which was drawn up separately refusing *Ogle's* application with costs. On the same day he made an order on further considera-

tion directing the funds in Court to be paid to the Plaintiff in part satisfaction of the arrears of her rent-charge and the balance to be raised by mortgage of the estate. It was not contended that this order could be objected to if the certificate was right.

On the 6th of July, 1888, *Ogle* gave notice of appeal against the two orders of the 12th of March, 1888.

Cozens-Hardy, Q.C., and *Bardswell*, for the Appellant.

Marten, Q.C. (*Sampson* with him), for the Plaintiff:—

I take the preliminary objection that the appeal from the refusal of the summons to vary the certificate is out of time. Order LVIII., rule 15: *Cummins* v. *Herron* (1); *White* v. *Witt* (2). Order LVIII., rule 15a, does not apply, for this is not a case of an order made on further consideration and on the hearing of a summons to vary the certificate, but the case of two distinct orders.

Millar, Q.C. (*Renshaw*, Q.C., with him), and *Horton Smith*, Q.C. (*Borthwick* with him), for the Defendants, took the same preliminary objection.

COTTON, L.J.:—

I think that this is in substance a case of one order made on further consideration and on a summons to vary the certificate. If it is not within the letter of rule 15a, it is so completely within its spirit that we ought in our discretion to extend the time for appealing, if such an exercise of our discretion is necessary.

LINDLEY, L.J.:—

I am of the same opinion. The object of rule 15a was to get rid of the inconvenience of having two different times allowed for appealing from two different parts of the same order. Here there was in fact only one order, an order on summons to vary the certificate and on further consideration, and it does not matter that it was written on two pieces of paper instead of one.

(1) 4 Ch. D. 787. (2) 5 Ch. D. 589.

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BOWEN, L.J.:—

I am of the same opinion.

The appeal then proceeded and was dismissed on the merits.

Solicitors: *W. F. Watson*, agent for *Jones & Wells, East Retford*; *P. Hodgkinson*, agent for *Pratt & Hodgkinsons, Newark*; *Cunliffes & Davenport.*

H. C. J.

C. A. 1888 BUTT, J. *Sept.* 19. C. A. *Nov.* 21, 22.

NATIONAL PROVINCIAL BANK OF ENGLAND *v.* MARSHALL.

[1888 N. 1359.]

Bond—Condition in Restraint of Trade—Injunction—Penalty—Liquidated Damages.

The Defendant on entering the service of the Plaintiffs, a banking company, executed a bond in the penal sum of £1000, the condition of which was that it should be void if he should perform his duties in the manner therein mentioned, and also if he should pay to the Plaintiffs £1000 as liquidated damages, in case he should at any time within two years after his leaving the service of the Plaintiffs accept any employment in any other bank within two miles of the Plaintiffs' bank. The Defendant resigned his employment in the Plaintiffs' bank and immediately entered the service of a rival bank in the same town. The Plaintiffs brought an action claiming an injunction to restrain the Defendant from holding employment in any rival bank. The Defendant was willing and offered to pay the penal sum of £1000:—

Held, that the Defendant could not satisfy his obligation by paying the penal sum; but that there was an agreement between the parties, to be implied from the bond, that the Defendant should not enter into the service of a rival bank, which could be enforced in a Court of Equity, and that the Plaintiffs were entitled to an injunction.

THIS was an appeal from an order of Mr. Justice *Butt*, sitting as Vacation Judge, on the 19th of September, 1888.

The Defendant *John Marshall* entered the service of the *National Provincial Bank of England* at *Cardiff* in January, 1879, as a clerk. His engagement was terminable on a three months' notice.

On the 17th of January, 1879, the Defendant executed a bond for payment to the banking company of £1000. It was recited

in the bond that the obligor being in the service of the said bank had been required and had agreed to enter into a bond to the said bank in a penal sum of £1000, conditioned as thereinafter mentioned. And the condition of the bond was that it should be void if the obligor should while employed by the said bank keep the accounts and perform the duties and obligations therein specified, "and also if the obligor, his executors or administrators, shall pay to the said bank the sum of £1000 as liquidated damages in case the obligor at any time within two years after he shall have retired from any employment in any capacity under the said bank, or shall have been dismissed therefrom, shall accept any employment, or allow himself to be or shall be employed in any capacity whatsoever in or for any bank not connected with the said bank within twenty miles of the said bank or any branch thereof at which he shall be employed at the time of such dismissal or retirement, or at which he shall have been employed at any time within six months prior to such dismissal or retirement."

The Defendant continued in the service of the bank till the 1st of September, 1888, when he voluntarily left: and a few days afterwards he entered into the service of the *South Wales Union Bank* as manager of a branch bank which they had recently opened at *Cardiff*.

On the 13th of September the Plaintiffs issued a writ against the Defendant claiming an injunction to restrain him from accepting any engagement in any bank unconnected with the Plaintiffs' bank within twenty miles of their principal bank.

On the 19th of September the Plaintiffs moved before Mr. Justice *Butt*, the Vacation Judge, for an interim injunction.

E. Beaumont, for the Plaintiffs.

Warrington, for the Defendant.

BUTT, J.:—

I had some doubt in the first instance as to whether the Courts of Equity would grant an injunction in a case of this sort, treating it as the case of an ordinary bond, with a condition as to not entering into similar service within a certain radius; but it

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appears pretty clear that there is authority for granting an injunction in those cases, and therefore the question comes simply to this. Is this to be regarded as one of those cases? in other words, is this bond to be treated as an ordinary bond with a condition against doing a certain act? Now, it is peculiar in its wording, and I am asked to hold on the wording of this particular bond that there is no agreement at all on the part of the Defendant not to serve other bankers within the prescribed radius, and certainly the words themselves to some extent favour that interpretation. I may say it is clear on the authorities that the Court has treated a condition in an ordinary bond of this nature as a covenant or agreement to do or not to do a certain thing. Is there such an agreement to be got from the condition of this bond? During the argument I had some doubts, but the broad common sense of the thing is this, that the bank meant and the Defendant meant, an agreement that he should not serve other bankers within the prescribed radius, and unless the words are so strong as to preclude my holding that to be the meaning of the clause I shall hold it to be the meaning of the clause. Now I have considered them, and I do not think they are. I have no real doubt as to what was meant here; I have no doubt that properly viewed this condition is an agreement on the part of the Defendant not to serve other bankers within the prescribed radius. That being the agreement it is not contested that he has broken it, therefore the injunction will go.

C. A. From this decision the Defendant appealed. The appeal came on for hearing on the 21st of November, 1888.

Both parties consented that the hearing of the appeal motion should be considered the hearing of the action.

Marten, Q.C., and *Warrington*, for the Appellant:—

The bond is in an unusual form, and must be construed according to its strict meaning. It is true that in several cases the Court has granted an injunction to enforce a bond, but in those cases the Court has proceeded on the agreement between the parties, which is evidenced either by the recitals in the bond or by some other circumstances. *Gravely* v. *Barnard* (1), *Howard* v.

(1) Law Rep. 18 Eq. 518.

Woodward (1), and *London and Yorkshire Banking Co.* v. *Pritt* (2), which were cited against us, are instances of this. In the present case the relation between the parties may have supported a claim for an injunction if the Defendant had broken the conditions of the bond which related to his conduct while in the service of the Plaintiffs. But after he had left their service he owed them no duty, he was *primâ facie* at liberty to seek employment anywhere, and there was no implied agreement between them on which to found an injunction. The words of the bond must, therefore, be taken strictly, and their natural meaning is that he must either abstain from accepting employment within twenty miles or pay £1000 to the bank. We are ready to pay the £1000, and we contend that such payment frees us from all obligation. The words "as liquidated damages" merely mean "in the nature of liquidated damages." They do not imply the existence of any agreement.

Sir *A. Watson*, Q.C., and *E. Beaumont*, for the Plaintiffs:—

The payment of £1000 would not compensate us for the injury which the Defendant might cause by taking employment in a rival bank. The form of the bond is that used by us in the case of all our *employés*, who would only be employed on the terms of their executing it. The real question is, what is the intention of the parties? Recitals of an agreement are not necessary. The only question is whether there was a good consideration for the bond. That was decided in *Gravely* v. *Barnard* (3). In *Howard* v. *Woodward* there were no recitals. The Court must determine according to the common sense view of the meaning of the parties: *French* v. *Macale* (4). The insertion of the words, "as liquidated damages" shew that there was an agreement the breach of which would damage the Plaintiffs.

Marten, in reply.

COTTON, L.J.:—

This was an appeal from an order for an interlocutory injunction made by Mr. Justice *Butt*, but the parties have agreed to

(1) 13 W. R. 132; 34 L. J. (Ch.) 47.
(2) 36 W. R. 135.
(3) Law Rep. 18 Eq. 518.
(4) 2 D. & War. 269.

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Cotton, L.J.

treat this appeal as the hearing of the action, so that the question may now be disposed of finally.

The question in dispute is whether the Plaintiffs have a right under this bond, which they required all their clerks to execute, to an injunction to restrain the Defendant from entering into the service of a rival bank within two years of his leaving the service of the Plaintiffs. That depends on the question whether there was an agreement to be gathered from the bond, upon the frame of which I cannot compliment the bank, sufficient to give them a right to such an injunction. The difficulty was this. The bond was for a penal sum of £1000, and the condition contained many clauses, some relating to things to be done and some to things not to be done. The last clause, on which the dispute has arisen, was as follows:—[His Lordship read the clause.] What is the meaning of this? It was contended by the Appellant that he had a right to enter into the service or employment of any other bank, provided he paid the penalty of £1000. That is not the exact language of the clause, and it may be observed that it is not very reasonable to suppose that it was the meaning of the parties; it was not likely that the bank would enter into such an agreement with their servants. The Court in construing such a bond must look at the condition of the bond throughout. It is true that in most cases there has been a recital in the bond, or some other evidence from which the Court has found that there was an agreement between the parties, and in such cases it has been held that if the obligee brings an action he can recover damages, but if he comes into a Court of Equity the agreement will be enforced, if no action for damages has been brought, and an injunction will be granted. Here there is a sum of £1000 named as liquidated damages, and the Plaintiffs say that the meaning of the clause is that if the bank brought an action, they were not to be obliged to prove what damage they had suffered, but would be entitled without proof of damage to recover £1000 as liquidated damages. That appears to me to be the correct view, but what is the consequence? That clause seems to me to lead to the conclusion that there was an agreement between the parties that the particular act, namely, entering into the employment of a rival bank, was not to be done.

Mr. *Marten* argued that the sum of £1000 was not meant to be paid as liquidated damages, but as in the nature of liquidated damages. That is not my view. It seems to me that it means that if the bank brought an action they might recover £1000 damages without actual proof of damage. How can there be damages if there is no broken agreement in respect of which they are claimed? They must be in respect of some violation of an agreement, and this clause, though awkwardly expressed, seems to me to shew that the bank looked at the condition as most material, and as prohibiting the Defendant from entering into the employment of any other bank. If there were no such clause he might have entered into any similar employment, but the clause shews that there was an implied agreement that he should not accept any such employment. I am, therefore, of opinion that there was an agreement which can be enforced by this Court.

It was suggested that the condition was unreasonably stringent, and therefore void as being a restraint of trade; but the point was not pressed, and I do not think it has been shewn to be unreasonable. There must be an injunction against the Defendant entering into the employment of any other bank within twenty miles of *Cardiff* till the expiration of two years from his leaving the service of the Plaintiffs.

LINDLEY, L.J.:—

I am of the same opinion. These bonds are not easy to construe, but we have to do our best to find out the meaning from the words of the condition and from what must have been the intention of the parties. One thing is clear, that the object of the bond was to prevent a clerk of the bank from entering into the employment of any rival bank; but this object is wrapped up in affirmative and not in negative language. There is no recital, nor any language expressly to the effect that the clerk shall enter into no other employment on leaving the service of the Plaintiffs; but it is impossible to read the words of the condition without coming to the conclusion that there was really an agreement between the parties to that effect. I was at first struck by the argument that the meaning of the clause in the condition was that the obligor should not enter into the

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service of any rival bank without paying £1000. But in my opinion, the true meaning of the condition is that which is contended for by the Plaintiffs, namely, that if the Plaintiffs should bring an action they were not to be embarrassed by having to prove actual damage, but should be entitled to recover £1000 damages. In the case of an ordinary bond it would be no answer to such an action that the Defendant was ready to pay the penalty. That is settled. And it is not consistent with the bond or with the intention of the parties that the obligor should be free if he paid the penalty of £1000. He could not acquire the right to break the agreement by paying the penalty. The Plaintiffs have an alternative remedy to enforce the agreement if they do not bring an action. Therefore I think the injunction was rightly granted, and must be continued.

BOWEN, L.J.:—

I am of the same opinion. Lord Justice *Cotton* has entirely expressed my views.

Solicitors: *Wilde, Berger, & Moore; Cunliffes & Davenport*, agents for *Williams, Cardiff.*

M. W.

In re HULL, BARNSLEY, AND WEST RIDING JUNCTION RAILWAY COMPANY.

C. A.
1888.
CHITTY, J.
June 18.
C. A.
Nov. 13, 24.

Railway Company—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 23 [*Revised Ed. Statutes, vol. xv., p.* 601]—*Debenture-holders—Surplus Lands—Judgment Law Amendment Act*, 1864 (27 & 28 *Vict. c.* 112) [*Revised Ed. Statutes, vol. xiv., p.* 976].

Sect. 23 of the *Railway Companies Act*, 1867, does not give to creditors of a railway company in respect of mortgages, bonds, or debenture-stock, any lien or charge which they did not possess before the Act, so as to entitle them to payment in priority out of the proceeds of surplus lands of the company, which have been sold on the application of the judgment creditors of the company.

ADJOURNED SUMMONS, raising the question whether the holders of debentures and debenture-stock issued by a railway company have acquired under sect. 23 of the *Railway Companies Act*, 1867, a charge on the surplus lands so as to entitle them to payment out of the proceeds of sale, in priority over other creditors of the company, including the judgment-creditors on whose application the sale was made.

The company was incorporated by the *Hull, Barnsley and West Riding Junction Railway and Docks Act*, 1880 (43 & 44 Vict. c. cxcix.), and by this and subsequent Acts powers were given to the company to borrow on mortgage, and to create and issue debenture-stock, subject to the provisions of the *Companies Clauses Act*, 1863. Under these Acts the company had issued debentures to the amount of £2,394,330, and debenture-stock for £65,670; the debentures being in the form of the mortgage deed set out in Schedule C to the *Companies Clauses Act*, 1845.

On the 29th of December, 1886, judgment was recovered against the company by two creditors (*Shelford* and *Bohn*) for sums amounting with costs to £12,360 18*s.* 8*d.*

On the 31st of December, 1886, *Shelford* and *Bohn* caused writs of *elegit* to be issued under which a nominal delivery was made to them by the sheriff of land found by the jury at the inquisition to be surplus land of the company.

On the 4th of January, 1887, *Shelford* and *Bohn* presented a

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petition (under the *Railway Companies Act*, 1867, s. 4), as unsatisfied judgment creditors, for the appointment of two persons as managers and receivers of the undertaking; and on the 6th of January, 1887, an order was made on their petition for the appointment of the two persons therein named, as managers and receivers to manage the general undertaking of the company; and directing inquiries as to the amount of the petitioning creditors' debt, and whether there were any other, and, if any, what debts of the company, and whether the same or any, and, if any, which of them, were incumbrances or charges on the undertaking or the tolls and moneys arising out of the same, or any and what part of the same respectively, and how the same respectively were created, and what were the rights and priorities of the persons for the time being interested therein.

On the 7th of February, 1887, a petition was presented by *Shelford* and *Bohn* under the *Judgments Law Amendment Act*, 1864 (27 & 28 Vict. c. 112), s. 4, praying a sale of the interest of the company in the lands and premises which had been delivered in execution, and that the money arising from such sale might be applied in payment to them of what was due to them under their judgment, and that all proper and necessary accounts might be taken, directions given, and inquiries made.

By the order made upon this petition on the 19th of February, 1887, the following inquiries were directed:—

1. What was due to *Shelford* and *Bohn* under their judgments of the 29th of December, 1886.

2. What lands and property had been extended under the writs of *elegit*, the nature and particulars of the interest of the company in such lands and property, and whether any and which of such lands and property were superfluous lands and not required for the purposes of the undertaking.

3. Whether there were any, and, if any, what liens, charges, or incumbrances upon such of the said lands (if any) as were superfluous lands, and what were the priorities and the amounts due in respect thereof. Pursuant to this order evidence was filed by *Shelford* and *Bohn* for the purpose of shewing that the lands extended were superfluous lands of the company.

The *Crown Life Assurance Company* were debenture-holders of

the railway company, and had obtained leave to attend the proceedings.

In May, 1887, they applied by summons (which was adjourned into Court) for a declaration that they were entitled in respect of their debentures in the railway company to, or to a lien on or to be paid out of the surplus lands of the company, and the proceeds of the sale thereof, in priority to the Petitioners *Shelford* and *Bohn*, and all other the creditors of the railway company, in respect of any moneys owing to them respectively, not being moneys borrowed by the company on mortgage or bond or debenture-stock under the provisions of their Acts, and that the Applicants might be allowed to rank against such surplus lands and the proceeds thereof for the sum of £—— and the interest thereon secured by their debentures. Pending the decision of the question raised by this summons the inquiries directed by the order of the 19th of February, 1887, were stayed.

It was arranged that for the purpose of the argument the Applicants (the *Crown Life Assurance Company*) should represent the debenture-holders and the debenture-stockholders.

The summons was heard before Mr. Justice *Chitty* on the 18th of June, 1888.

Chadwyck-Healey, in support of the summons :—

Assuming that we have no charge upon the land by virtue of our debenture security, we have the general undertaking of the company to pay. As soon as any property, by delivery under an *elegit* and sale, has become available for creditors, the proceeds must be applied by the receiver amongst the creditors according to their several priorities. Those priorities are determined by the *Railway Companies Act*, 1867, s. 23, which enacts that "all money borrowed or to be borrowed by a company on mortgage or bond or debenture-stock under the provisions of any Act authorizing the borrowing thereof shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act." Some meaning must be given to this section, and all that the Court is asked to do is to administer the proceeds of sale of the surplus

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lands, which are available for distribution amongst creditors, according to the priorities as provided by the Act, and therefore in satisfaction of the Applicants' charge in priority over other creditors of the company.

[CHITTY, J.:—You are seeking to enlarge your security.]

Before the Act mortgagees and bondholders had no such charge as we claim, but full effect cannot be given to sect. 23 unless our right to a lien is declared.

[CHITTY, J., referred to *Russell* v. *East Anglian Railway Company* (1).]

[*Imperial Mercantile Credit Association* v. *Newry and Armagh Railway Company* (2), and the *Companies Clauses Act*, 1845, s. 38, were also referred to.]

Reginald Bray (*Romer*, Q.C., with him), for the judgment-creditors:—

Mortgage debentures do not give any lien or charge upon the surplus lands of the company, or on the proceeds of sale of such lands: *Gardner* v. *London, Chatham and Dover Railway Company* (3), and sect. 23 of the *Railway Companies Act*, 1867, cannot have the effect of enlarging the security, which has been contended for by the Applicants: *In re Cambrian Railways Company's Scheme* (4). [He also cited *In re Calne Railway Company* (5).] From what date does the priority, claimed by the Applicants to have been given by sect. 23, commence, for according to the argument it does not arise until the judgment-creditor has taken steps to enforce his judgment against the land?

Chadwyck-Healey, in reply.

CHITTY, J. (after stating the case, and observing that the appointment of a receiver and manager of the undertaking of the railway company under the Act of 1867 made no difference in the determination of the case, proceeded):—

In these circumstances the debenture-holders come forward and

(1) 3 Mac. & G. 104.
(2) I. R. 2 Eq. 524.
(3) Law Rep. 2 Ch. 201.
(4) Ibid. 3 Ch. 278, 297, 298.
(5) Law Rep. 9 Eq. 658.

say they are within the inquiry directed by the order of the 19th of February, 1887, and that they have either a lien, charge or an incumbrance upon the superfluous lands. The mere statement of that appears, after *Gardner's Case* (1), startling, and counsel is bound to admit that after that case, as a general proposition, the debenture-holders who have a statutory mortgage on the undertaking itself—have no lien or charge or incumbrance on the superfluous lands. The words of sect. 23 of the *Railway Companies Act*, 1867, have been relied on as creating a charge in favour of the debenture-holders. I have read that section through, and I am not satisfied that I am at the present moment in a position to say exactly what the section does mean, or to give a judicial determination as to its full scope and effect. But all I have to do is to say whether this particular claim is within the section, and it appears to me that there are no words to justify the Court in holding that the section has created that which did not exist before, a specific lien upon the superfluous lands in favour of the debenture-holders, who had no such lien apart from the section. [His Lordship after reading the section proceeded :—] The enactment therefore in that section confers a priority, but it appears to me there is involved in that, that there is already some existing charge or lien. At any rate, whether that is correct or not, words which only say that there shall be a priority are not sufficient to create a charge, and I do not think it was the meaning of the Legislature to create a charge, whatever the true exposition of this section may be, because if it is so the charge would attach to the superfluous lands themselves, and the company never could deal with the superfluous lands. That difficulty was seen by counsel, who endeavoured to take some particular point of time at which, he said, his charge crystallised, viz., when the judgment creditor asserted his right as against the surplus lands. There is nothing in the Act about that; and other equally ingenious and subtle suggestions were made which have no foundation whatever in the language of the section itself. Then not accepting—in fact rejecting—his argument that there is a specific lien or charge, the case seems to me to be outside the order, because there is only an inquiry as to what are the liens.

(1) Law Rep. 2 Ch. 201.

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But then it is contended, in some way or other, that when the Court had in its hands the proceeds of the sale of the superfluous lands which were sold at the instance of the judgment-creditors, who have a right to have the land sold under the Act and to be paid, subject of course to any prior liens, charges or incumbrances, it was administering an estate, and that the debenture-holder had a right, as he said, to be paid with his priority. I cannot find that again in the section. I can find nothing that will justify that very ingenious suggestion.

I have not pretended to give anything like an exhaustive interpretation of the section itself, which I leave to a future occasion, should the section in question be ever again submitted to judicial construction, but the substance of my judgment is that the debenture-holders, and the debenture-stockholders, are not entitled to a lien on, or to be paid out of, the superfluous lands.

F. G. A. W.

From this decision the *Crown Life Assurance Company* now appealed. The appeal came on for hearing on the 13th of November, 1888.

Whitehorne, Q.C., and *Chadwyck-Healey*, in support of the appeal:—

As holders of debentures and debenture-stock we do not claim any lien or charge, but we say that we are entitled under sect. 23 of the *Railway Companies Act*, 1867, to priority over all other creditors of the company. The judgment of Mr. Justice *Chitty* proceeds on the footing that the section must be read as giving priority to those only who had an existing lien or charge. But this construction is, we submit, wrong. First, it would make the whole section inoperative by leaving bondholders and mortgagees of a company, who had no charge or lien on the estate and effects of the company (*Russell* v. *East Anglian Railway Company* (1)) in the same position as they were before the Act, and no better off than any other creditors; and then useless, as anyone who has a lien or charge has independently of the Act

(1) 3 Mac. & G. 104, 125.

priority over other creditors. Then it would be introducing into the section qualifying words, and according to the general rule of construction the words of an Act must be construed in their natural and ordinary sense; and nothing less than manifest absurdity will induce the Court to say that the ordinary and natural meaning is not the true meaning: *The Alina* (1); *Cargo ex Argos* (2). The priority which we claim as holders of debentures and debenture-stock has been distinctly recognised in *Midland Wagon Company* v. *Potteries, Shrewsbury and North Wales Railway Company* (3). "Sect. 23 provides that money borrowed on mortgage or bond or debenture-stock is to have priority over all other debts. No doubt this made a revolution in the law, as it placed mere mortgagees or bondholders above all other creditors," Baron *Pollock*, and again, *per* Mr. Justice *Stephen*: "It is necessary to balance the interests of creditors and debenture-holders, and possibly to sacrifice the interests of one class to those of another. The Legislature has said under these circumstances that debenture-holders are to have the priority." *In re Cambrian Railways Company's Scheme* (4) was also referred to on this point. Priority being given, the idea of payment is necessarily involved, and, so soon as property of the company, in the shape of money, or the proceeds of sale, becomes available for distribution, our priority under sect. 23 attaches, and payment will be made according to such priority. *Gardner's Case* (5) only settled that debenture-holders have no specific charge upon the property of the railway itself, and cannot affect the priority given to mortgagees of the undertaking by sect. 23, in the administration by the Court of the fund to be distributed.

Romer, Q.C. (*Reginald Bray*, with him), for the judgment-creditors:—

Before the Act of 1867 it is clear that any creditor of the company who had obtained judgment had a charge and could get a sale of surplus lands. Has that Act, in favour of creditors of the company on mortgage bond and debenture-stock, deprived the judgment-creditors of their right of dealing with the surplus

(1) 29 W. R. 94.
(2) Law Rep. 5 P. C. 134, 153.
(3) 6 Q. B. D. 36, 40, 41.
(4) Law Rep. 3 Ch. 278, 282, 286–7, 297–8.
(5) Law Rep. 2 Ch. 201.

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lands? The Appellants do not directly claim to have a lien on the surplus lands, but they say that in some way they are entitled to intervene and to be paid in priority over any judgment-creditor; in other words that the company cannot pay any debt incurred in carrying on the undertaking until the debenture-holders are satisfied. Such a construction is quite untenable, and would render it impossible for any company to carry on business. And, *à fortiori*, how can the holders of debenture-stock which is a permanent charge have any right to payment in priority? Sect. 23 which was not new, having before *Gardner's Case* (1) been inserted in special railway Acts as a provision applicable to the particular company, is dealing with claims which do not give any charge or lien on the property of the company, and says in effect that the company shall not create any subsequent charge which shall have priority over debts secured by mortgage, bond, or debenture: the object of the clause appearing to be "to make clear the priority of money borrowed on mortgage, bond, or debenture-stock as against claims on the company on account of debts or engagements incurred or entered into by them after the passing of the Act": *In re Cambrian Railways Company's Scheme* (2). He also referred to 27 & 28 Vict. c. 112, ss. 4, 5, and *Gardner* v. *London, Chatham and Dover Railway Company*.

Whitehorne, in reply:—

I do not claim any general charge, and it is true in a sense that I have no such right as will entitle me to lay hands on any portion of the company's property; but now that property of the company has become available for payment of debts my right of prior payment given by sect. 23 arises. And when an order for sale of the debtor's land has been obtained by a judgment-creditor the practice of the Court with respect to sales of real estates of deceased persons for payment of debts is to be adopted: *Judgments Law Amendment Act*, 1864 (27 & 28 Vict. c. 112), s. 4; and the proceeds distributed among the persons found entitled thereto, according to their respective priorities: *Ib.* s. 5. The construction put forward on behalf of the judgment-creditors would reduce sect. 23 to a mere nullity.

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 3 Ch. 297.

1888. Nov. 24. COTTON, L.J., (after stating the case, continued):—

The position of the debenture-holders at the time of passing the Act (30 & 31 Vict. c. 127) must first of all be considered. It had then been recently decided by the Court of Appeal in *Gardner* v. *London, Chatham and Dover Railway Company* (1) that the debenture-holders of that company had no specific charge as against the surplus lands of the company which had been sold or were just about to be sold, but that the position of the debenture-holders was that they had a lien on the undertaking. Now, the "undertaking" meant the railway as a going concern, and therefore they had no claim or specific charge as against any surplus asset or any chattel belonging to the railway company, but they were simply entitled to have a charge on the undertaking, to receive the fruits of "the fruit-bearing tree," as was said by Lord *Cairns* (2), "the produce of which is the fund dedicated by the contract to secure and to pay the debt." I think that was right, and therefore, independently of sect. 23 of the Act of 1867, they have no lien, charge, or specific claim against the surplus lands which have been sold in the present case. We must consider, therefore, whether that section was intended to give and does give them any such claim. Looking at the section one cannot, in my opinion, come to that conclusion. There was the decision lately made by the Court of Appeal, and it is said that the clause was not new, having been previously introduced into special Acts. I do not say much upon that, although, no doubt, it is a strong circumstance. But, in my opinion, if Parliament had intended to give debenture-holders by this section what they had not before—a charge or specific lien against the surplus lands and against any other property of the company—it would have used different language. What the section says is that they are to have priority against the company, and the property from time to time of the company, over all other claims on account of any debts incurred or engagements entered into by them after the passing of the Act. That does not point to their having any priority by way of charge as against those who, like the judgment-creditors here, have by their diligence obtained a specific right to the proceeds of this sale,

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 2 Ch. 217.

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when the sale has been effected under the provisions of the earlier Act (27 & 28 Vict. c. 112). It refers certainly to what was to be done with the money to be received by the receiver appointed under sect. 4; and that was very reasonable, because there being a protection of the rolling stock of the railway company, *i.e.*, of those chattels which were used for the purpose of carrying on the traffic of the company, from being taken by the judgment-creditor, the judgment-creditor was entitled to get a receiver, and he would thereby obtain the proceeds of the undertaking—"the fruit of the growing tree," the very thing to which, according to *Gardner's Case* (1), the debenture-holder had to look. In dealing with property collected by the receiver under sect. 4, this clause would apply, and priority would be given to the debenture-holder in the application of such property amongst the creditors of the company. There might be other cases to which it would apply. If there was anything in the nature of an administration action to administer those assets of a railway company which were free and not subject to any charge, as there might be in the case of the abandonment of a railway, then that section would have full effect by putting the debenture-holders in priority over all those who had not any charge or specific lien on any portion of the property of the company, and that rather is pointed to in the words "against the company, and the property from time to time of the company." When there is a specific lien or charge granted by the company, then, to the extent of the lien or charge, that ceases to be the property of the company. To use a phrase not strictly applicable, the property of the company is the equity of redemption, or that only which remains after satisfying the specific lien or charge. I will not say those are the only circumstances to which that clause may apply, but without holding that it gives the debenture-holders a charge in competition with the judgment-creditors, those two matters which I have mentioned do point out sufficient to satisfy this clause, so as not to reduce it to a nullity.

We must then consider the earlier Act (27 & 28 Vict. c. 112) under which (sect. 4) the judgment-creditor has taken the land in execution. Without going into the question of what is

(1) Law Rep. 2 Ch. 201.

"actually delivered in execution," the judgment-creditors have put themselves in the position pointed out by that section, have availed themselves of it, and have got an order. It was contended that the remaining part of the section would shew that the proceedings under this order are really to be an administration of the property of the railway company, just as if the estate of a deceased person were being administered. But that is not so; the section only says that proceedings shall be carried on in the same way. Certain inquiries must, of course, be made with reference to the specific charge or lien upon the land seized, but what the words relied on refer to is simply that the proceeding shall be the same mode of proceeding as it would be under a decree for the sale of the real estate of a deceased person. Then sect. 5 says that if it shall appear on making such inquiries that any other debt due on any judgment, statute or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale. In my opinion these debenture-holders have not got any charge on the land given them. Then it goes on: "And shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities." A judgment-creditor has by his diligence got a charge on the land, which specifically affects the land; then he gets a sale, and then there is to be an inquiry whether there are any persons besides himself who have got any charge on the land by what is then pointed out, and then there is to be a distribution as among those persons who have a charge, according to their respective priorities. In my opinion the matter turns upon sect. 23. If, as in my opinion is the case, that section does not give a debenture-holder any charge on that which formerly he had no charge upon, then the Appellants fail, and Mr. Justice *Chitty* was right.

LINDLEY, L.J.:—

I am of the same opinion. The argument on behalf of the Appellant goes too far, for it practically comes to this, that the

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holders of debentures and mortgages in the ordinary Company's Clauses form and of debenture-stock have got a charge on all the property of the company. If that is true to-day, it was true in 1867 when this Act was passed, and it has been true ever since. What has been the invariable practice in selling superfluous land since 1867? Did anybody hear of a purchaser requiring the concurrence of debenture-holders? It does not follow that because the invariable practice is contrary to the Appellants' contention that their contention is wrong. The invariable practice may be wrong, but that is not likely. Take another case: under sect. 4 of this Act the rolling stock of the company is protected from seizure by a *fi. fa.*; other ordinary chattels are not; but other ordinary chattels are within sect. 23—if anything is. Suppose then the judgment-creditor to issue a *fi. fa.* against the company and to seize some chattels seizable at Common Law, not protected under sect. 4. According to the argument, whatever is seizable under that *fi. fa.* must be brought into Court at some time or other, and administered or distributed amongst the debenture-holders. Did anyone ever hear of such a thing? If that contention were right the business of the company would come to a dead lock. Then Mr. *Whitehorne* says, and I think he is quite justified in saying, that the language of sect. 23 is perfectly general—so it is—"All money borrowed or to be borrowed, &c." The question is, when does that section come into operation? On looking into the matter I can only suggest three occasions on which it comes into operation. I do not decide that there are no others, but no others have occurred to me. The first is when a receiver is obtained under sect. 4. The concluding words of that section state that the receiver is to apply what he receives in payment of the creditors according to their priorities; and interest payable to the debenture-holders would, I apprehend, come before interest payable to other creditors. Another case is when a railway company is being wound up under the joint operation of the *Railway Companies Abandonment Act* and the winding-up clauses of the *Companies Act*, 1862, which are applicable to railways when they have first been abandoned. In such cases it is quite obvious that sect. 23 has a most important application. The third case is, when arrangements

have been made under schemes which are provided for by this same Act of 1867, and certain consents have to be got. In working out these schemes attention must be paid to priorities, and then, again, sect. 23 comes in and says what position the debenture-holders are to be considered as occupying. That section, therefore, has an important bearing in considering how to deal with schemes of arrangement under the Act. There may possibly be some other case, although it does not occur to me now; but I cannot read sect. 23 as equivalent to this, that under that section the holders of mortgages, debentures, and debenture-stock are to have a charge on the company's assets. That is quite another matter. They have priority, but the question is, when the priority comes into practical operation. I have endeavoured to answer that question. In my opinion sect. 23 has nothing whatever to do with the circumstances with which we are now dealing. It has no application to such a case, and the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The case turns, in my judgment, as in that of my learned brethren, on the true construction of sect. 23. That section, as it seems to me, does not give a charge. The words used are "shall have priority against the company, and the property from time to time of the company over all other claims." It seems to me that means shall have priority in all cases in which the free assets of the company, or free moneys released by the sale of the company's property, are being distributed or administered with reference to the priorities. That would include cases arising under sect. 4, and probably the other cases to which the Lord Justice *Lindley* has referred. I do not think it possible to suppose that a section so obscurely worded was intended to displace the rights of diligent judgment-creditors any further. If so, the change in the law would, I think, have been made in clearer language, and although I do not base my judgment upon the construction on the impression that has been formed about this section since, yet I think it is somewhat remarkable that this is the first time, as far as I know, that the contention that the rights of diligent judgment-creditors were

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displaced by that section has been put forward in a Court of Justice. I think if that had been the true construction of the section, it would have been found out before twenty years had passed from the time when the statute became law. I agree with the judgment of the rest of the Court, and think that this appeal must be dismissed with the usual result.

Solicitors: *Spencer Whitehead*, for *Milward & Co., Birmingham; Hargrove & Co.*

F. G. A. W.

C. A. 1888 *Nov.* 20, 24.

COLE *v.* SAQUI AND LAWRENCE.

[1887 C. 4081]

Patents, Designs, and Trade Marks Act, 1883, *s.* 29, *sub-s.* 6—*Particulars of Objection—Certificate—Costs.*

The Court of Appeal in reversing the decision of the Court below in favour of a patent, has jurisdiction to grant the Defendant under sect. 29, sub-sect. 6 of the *Patents, Designs and Trade Marks Act*, 1883, a certificate that his particulars of objection to the patent were proven, or were reasonable and proper, so as to entitle him to be allowed on taxation costs in respect of such particulars.

IN this case the decision of Mr. Justice *Kekewich* upholding the validity of the Plaintiff's patent for "improvements in combination and mechanism for actuating mechanical automatic toy figures or other toy objects" was reversed by the Court of Appeal.

After delivery of the judgment allowing the appeal,

Neville, Q.C. (*Moulton*, Q.C., *Chadwyck Healey*, and *Hickey*, with him), on behalf of the Defendants, applied for a certificate under the *Patents, Designs and Trade Marks Act*, 1883, s. 29, sub-s. 6 (1), that the particulars of objections delivered by the Defendants

(1) 46 & 47 Vict. c. 57, s. 29, sub-s. 6, enacts that "On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case."

were reasonable and proper. This was necessary in order that they might be allowed the costs in respect of those objections. The Court of Appeal had power to grant this certificate: *Badische Anilin und Soda-Fabrik* v. *Levinstein* (1).

E. S. Ford (*Aston*, Q.C., *Warmington*, Q.C., with him), for the Plaintiff, submitted that the Court of Appeal had no jurisdiction to give the certificate; the words of the Act being "the Court or a judge," which pointed to the Court of primary jurisdiction.

COTTON, L.J.:—

In this case we reversed the decision of Mr. Justice *Kekewich*, who had granted an injunction, holding the patent on which the Plaintiff sued to be good. We dismissed the action, holding that the patent was bad.

The Defendants have applied for a certificate under sect. 29, sub-sect. 6 of the *Patents, Designs and Trade Marks Act*, 1883, to enable them to obtain the costs of their particulars of objections. [His Lordship read the sub-section.]

Of course Mr. Justice *Kekewich* did not give any certificate at all to the Defendants who put in particulars of objection; but we have upheld the defence, and it is only placed in the paper again because some little doubt was expressed as to whether we could grant a certificate under that sub-section. I do not think that the Court of Appeal is the Judge pointed at; it must mean the Judge of the High Court who hears the matter originally, or a Divisional Court of the High Court. But in the Court of Appeal we ought to make such an order as, in our opinion, the Judge who heard the case and from whom the appeal is brought, ought to have made. In this case we thought he ought to have dismissed the action, and then of course he ought to have considered what particulars were proven, or reasonable and proper. In our opinion we ought to do that as he has not done it, and could not do it having regard to the conclusion at which he arrived. It has really been done in several patent cases which have been before this branch of the Court, and that being so, we ought in our opinion to grant a certificate stating what particulars

(1) 29 Ch. D. 366.

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of objection we think were reasonable and proper. [His Lordship specified the particulars of objection to be included in the certificate.]

LINDLEY, L.J. :—

I agree.

BOWEN, L.J. :—

I agree; but I should like to add with regard to sub-sect. 6 that I think it is an unfortunate one, and will be found extremely difficult to work by the Court below, but still more so by this Court.

COTTON, L.J. :—

Lord Justice *Bowen* has expressed my opinion. I quite agree that this is an unfortunate section, because it may cast on the Court below and on the Court of Appeal the duty of inquiring into a matter which is wholly unnecessary for the purposes of their decision.

LINDLEY, L.J. :—

It should have been left to the Taxing Master.

Their Lordships also intimated that they were not proceeding upon the decision in the *Badische Anilin und Soda-Fabrik* v. *Levinstein* (1), which was a different case.

Solicitors: *Saunders, Hawksford, Bennett & Co.; Phelps, Sidgwick & Biddle.*

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F. G. A. W.

GRANT *v.* UNITED KINGDOM SWITCHBACK RAILWAYS COMPANY.

C. A. 1888 Nov. 28.

[1888 G. 1834.]

Company—Ratification by Company of particular act of Directors in excess of Authority—Alteration of Articles.

The articles of the *T. Company* authorized the sale of part of its undertaking to any other company, and contained a provision prohibiting any director from voting in respect of any contract in which he was interested. The directors entered on behalf of the company into a contract for sale of part of its undertaking to the *U. Company*, of which all the directors of the *T. Company* except one were directors. A general meeting of the *T. Company* was called by a notice stating that it was called to consider a resolution for approving and adopting the agreement, but not stating any ground for a meeting being necessary. The resolution was passed as an ordinary resolution, but not as a special resolution:—

Held, that though a resolution giving the directors powers to do certain acts in future which they were not authorized by the articles to do, would be an alteration of the articles, and would require to be passed as a special resolution, the adoption of a contract which was within the objects of the company, but which the directors had entered into without authority, was not an alteration of the articles, and could be effected by ordinary resolution:

Held, also, that the resolution of the general meeting was not invalidated by the fact that the notice convening it did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting.

Decision of *Chitty*, J., affirmed.

THOMPSON'S Patent Gravity Switchback Railways Company was incorporated as a limited company on the 18th of November, 1887. The objects were, *inter alia*, to acquire the business of proprietors and licensors of gravity switchback railways carried on by *Alfred Pickard* and the Plaintiff, and among the objects specified were, "(*h*) to promote any company for the purpose of acquiring any of the property or rights of this company, and generally for any purposes which this company may think conducive to its objects." "(*m*) To sell the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular, for a consideration consisting in whole or in part of cash or shares or debentures of any other

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company having objects altogether or in part similar to those of this company."

The directors were not to be fewer than three or more than seven. Two directors were a quorum.

It was provided by art. 100 that "no director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise, nor shall any such contract or arrangement entered into by or on behalf of the company with any company or partnership of or in which any director shall be a member or otherwise interested be avoided, nor shall any director so contracting, or being such member or so interested, be liable to account to the company for any profit realized by any such contract or arrangement by reason only of such director holding that office or of the fiduciary relation thereby established, but no such director shall vote in respect of any such contract or arrangement."

Art. 152 enabled the company by special resolution to alter all or any of the regulations of the company with certain exceptions not affecting the present case.

The Plaintiff was a shareholder in *Thompson's Company*.

In September, 1888, the *United Kingdom Switchback Railways Company* was registered as a company with limited liability. It was promoted by the directors of *Thompson's Company*, and was established for acquiring and carrying on the business of *Thompson's Company* so far as the *United Kingdom* was concerned.

There were five directors of *Thompson's Company* and six of the *United Kingdom Company*. Four persons were members of both boards.

On the 13th of September, 1888, a contract under the seals of the two companies was entered into by which *Thompson's Company* agreed to sell to the *United Kingdom Company* a large part of the property of the former company.

The Plaintiff brought this action against the two companies to restrain them from carrying the agreement into effect, and moved for an injunction.

On the 26th of September Sir *James Hannen*, as vacation Judge, ordered the motion to stand over till the Michaelmas sittings, the companies in the meantime undertaking not to act

under the agreement, but they were to be at liberty to call meetings of their shareholders on the subject.

An extraordinary meeting of the shareholders of *Thompson's Company* was held on the 22nd of October, at which a resolution was proposed, "That the agreement dated the 13th of September, 1888, between" [the two companies] "be and the same is hereby approved and adopted, and that the directors be and are hereby authorized to carry into effect the same agreement." The notice summoning the meeting stated that this resolution would be proposed, but did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting.

The resolution was passed, but not in such a way as to make it a "special resolution."

On the 9th of November the motion for the injunction came on, and Mr. Justice *Chitty* being of opinion that the *Thompson's Company* had adopted the contract, refused the injunction. The Plaintiff appealed.

Gregson, for the Appellant:—

I contend that, so long as the articles were in force, a contract entered into by directors who were interested in the subject-matter, and therefore had no right to vote, was void, and a resolution confirming it was an alteration of the articles which could only be made by a special resolution. The agreement was *ultrà vires* the directors, was a nullity, and could not be ratified in this way: *Clay* v. *Rufford* (1).

[COTTON, L.J.:—There it was held that the contract was beyond the powers of the company while the articles were in force. Here does not the resolution make the contract a contract by the company?]

The observation of Sir *Barnes Peacock* in *Irvine* v. *Union Bank of Australia* (2) is in my favour, though the passage on page 375 as to confirmation by a meeting is somewhat against me. The articles cannot be altered except by special resolution, and art. 100 is not to be read as saying that the directors interested shall not vote except with the sanction of a general meeting, but that they shall not vote without the sanction of a special resolution.

(1) 5 De G. & Sm. 768. (2) 2 App. Cas. 366, 374.

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The notice calling the meeting was insufficient, as it contained no intimation that the contract was one into which the directors had no power to enter.

Romer, Q.C., and *Eve*, *contrà*, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty* refusing an injunction to restrain *Thompson's Company* and the *United Kingdom Company* from carrying into effect a contract for the sale of part of the undertaking of the former company to the latter. The ground of the application was that the directors of *Thompson's Company* had no authority to enter into the contract, as the articles prohibited a director from voting upon a contract in which he was interested, and here all the directors but one were interested. An application for an injunction was made in the Long Vacation, and ordered to stand over till the Michaelmas Sittings, the companies undertaking not to act upon the agreement in the meantime, but being left at liberty to call meetings of their shareholders with reference to the agreement. A general meeting of the shareholders of *Thompson's Company* was accordingly held, and passed a resolution approving and adopting the agreement, and authorizing the directors to carry it into effect. Mr. Justice *Chitty* under these circumstances refused an injunction, and the Plaintiff has appealed.

It was urged for the Appellant that the directors could not, being interested, make a contract which would bind their company, and that a general meeting could not, by a mere ordinary resolution, affirm that contract, for that this would be an alteration of the articles, which could only be effected by a special resolution. This is a mistake. The ratifying a particular contract which had been entered into by the directors without authority, and so making it an act of the company, is quite a different thing from altering the articles. To give the directors power to do things in future which the articles did not authorize them to do, would be an alteration of the articles, but it is no alteration of the articles to ratify a contract which has been made without authority.

It was urged that the contract was a nullity, and could not be ratified. That is not the case. There was a contract entered into on behalf of the company, though it was one which could not be enforced against the company. Article 100 prevented the directors from binding the company by the contract, but there was nothing in it to prevent the company from entering into such a contract. Two passages in *Irvine* v. *Union Bank of Australia* (1) were referred to. Being in the same judgment, they must be taken together, and they appear to me to express what I have said—that power to do future acts cannot be given to directors without altering the articles, but that a ratification of an unauthorized act of the directors only requires the sanction of an ordinary resolution of a general meeting, if the act is within the powers of the company.

It was argued that the meeting was not good because the notice convening it gave no intimation that the contract was one which could not be carried into effect without the sanction of a general meeting. I think that the difficulty was sufficiently suggested by the mere fact of a meeting being called, for had it not been for the fact that the directors were interested, no meeting would have been necessary. But it is unnecessary to enter into that. A majority of a meeting called with due notice of the object for which it was called could make this a contract of this company, and it would be wrong for the Court to interfere with the proceedings of a general meeting as to an act within the powers of the company. It is clear that a contract of this nature was within the objects of the company, and the appeal, in my opinion, fails.

LINDLEY, L.J. :—

The Appellant contends that the company could not ratify this contract except by special resolution. In my opinion that contention is unfounded. There is a broad distinction between altering the articles and merely saying "this act was not authorized by the articles, but we will ratify it." The shareholders can ratify any contract which comes within the powers of the company, and this contract clearly does, for the articles

(1) 2 App. Cas. 366.

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expressly authorize selling any part of the undertaking of the company.

As to the alleged insufficiency of the notice calling the meeting, I have nothing to add to what has been said by the Lord Justice *Cotton*.

BOWEN, L.J.:—

The contract here was entered into by directors who, being interested, had no right to vote. The company at a general meeting ratified and adopted it. The Appellant contends that this ratification was an alteration of the articles, and could only be made by a special resolution. That is not so. The company did not purport to alter the limits of the authority given generally by the articles to the directors. The articles limit that authority, but there is nothing in them to prevent the company from giving special power to the directors in a particular case as to a particular contract. The company at a general meeting adopt this agreement, and make it their own. That is a ratification of an unauthorized act, not an alteration of the articles. As regards the notice calling the general meeting, I have nothing to add.

Solicitors for Appellant: *W. Webb & Co.*
Solicitor for Defendants: *Thomas A. Jones.*

H. C. J.

In re FAURE ELECTRIC ACCUMULATOR COMPANY.

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Nov. 3, 5, 6, 7, 13.

Company—Winding-up—Director—Trustee—Misfeasance—Breach of Trust—Shares—Allotment—Transfer—Brokerage—Commission—Ultrà Vires—Memorandum of Association—"Conducive"—Companies Act, 1862, s. 165 [*Revised Ed. Statutes, vol. xiv., p.* 238]—*Companies Act*, 1867, s. 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

If directors of a limited company apply the money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust: but if they apply the money of the company, or exercise any of its powers, in a manner which is not *ultrà vires*, then a strong and clear case of misfeasance must be made out to render them liable for a loss thereby occasioned to the company.

Payment of brokerage or commission to a stockbroker for placing a company's shares is an improper application of its capital, and is not authorized even by a power given by the memorandum of association to do whatever may be "conducive to" the specified objects of the company.

The memorandum of association of a limited company empowered the company to carry on the businesses there specified and "to do all such other things as the company may deem conducive to the attaining of any of the aforesaid objects." The articles of association provided that no transfers of shares not fully paid up should be registered unless "approved" by the directors. *M.*, a stockjobber, offered to take a large number of £10 shares at par, paying £2 per share at once, provided the directors paid a commission to the stockbroker who had introduced the shares to him. Thereupon the directors allotted the shares to *M.*, he paying £2 per share, and they paid a commission of 2*s.* 6*d.* per share to the stockbroker, the total amount of commission so paid being considerable. *M.* subsequently transferred the shares to *P.*, who was already a shareholder and had recently been elected a director, the directors believing that *P.* was a proper person to take a transfer of the shares and having been advised by their solicitor that there was no valid objection to the transfer. *P.* afterwards became bankrupt, being indebted to the company in the balance of £8 per share. The company having been ordered to be wound up, the liquidators took out a summons under sect. 165 of the *Companies Act*, 1862, against the directors other than *P.* claiming damages for misfeasance in sanctioning the transfer of the shares to *P.*, and also repayment of the sums paid for brokerage or commission on the shares as being *ultrà vires*:—

Held, upon the evidence, that the directors had duly exercised their judgment upon and "approved" the transfer to *P.* within the meaning of the articles, and that—dishonest dealing not being charged—the approval of the transfer was not such a "misfeasance" or breach of trust within sect. 165 of the *Companies Act*, 1862, as to render the directors liable in the winding-up: but

Held, that the payment of commission on the shares was *ultrà vires*, and

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that the directors must repay the same to the liquidators, with interest at 4 per cent.

Lydney and Wigpool Iron Ore Company v. *Bird* (1) considered.

Pickering v. *Stephenson* (2) and *Studdert* v. *Grosvenor* (3) distinguished.

The position of a director of a joint-stock company and that of an ordinary trustee distinguished.

ADJOURNED SUMMONS.

The *Faure Electric Accumulator Company, Limited,* was incorporated on the 13th of February, 1882. The objects of the company, as stated in clause 3 of the memorandum of association, were very numerous, being in effect to enter into and carry out an agreement for the purchase of certain electric patents, to carry on the business of electricians, and to promote new companies with similar objects; and the clause concluded "and to do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company."

Clause 5 fixed the capital of the company at £1,000,000, divided into 80,000 ordinary shares of £10 each and 200,000 deferred shares of £1 each.

Art. 28 of the articles of association provided, "no transfer of shares not being fully paid up shall be registered unless and until the transferee is approved by the board of directors: and the board at their discretion may decline to register any transfer of shares upon which the company has a lien."

Art. 92 authorized the directors, "out of the funds of the company, to pay the necessary legal and other expenses of and incident to the promotion, formation, and registration of the company, and all other preliminary expenses of the company." On the 15th of February, 1882, the company entered into an agreement for the purchase of certain patents under which large payments had to be made in shares of the company; 20,128 shares of £10 each were subsequently allotted to the general public; and in this manner all the original £10 share capital was issued, except about 20,000 shares.

In the month of May following the company got into litigation with another company who, they alleged, were infringing their patents. A M. *Simon Philippart,* who was familiar with the mode

(1) 31 Ch. D. 328; 33 Ch. D. 85. (2) Law Rep. 14 Eq. 322.

(3) 33 Ch. D. 528.

of working the company's patents, attended in that month at a meeting of the board, accompanied by one *Pincoffs*, a London stockbroker, who acted as his interpreter. *Philippart* was a holder both of original and deferred shares. He had made himself very active in the company's affairs; and upon the 22nd of May, 1882, he wrote to the board offering to take up the unsubscribed capital of the first issue, namely, the £10 shares, by taking 5000 shares himself and 5000 by his friends, on condition that his friends should have the option, till the 15th of June, of taking up the remaining 10,000 shares; and stipulating that he, *Philippart*, should be elected a director, and that no brokerage should be paid in respect of the allotment of these shares. This proposal was considered at a board meeting on the next day, the 23rd of May, and declined. On that day *Pincoffs* wrote to the directors: "I beg to offer to place 7500 shares of your company at par upon condition of your giving my client the option of taking the remaining 12,382 unapplied-for shares at par until the 23rd of June next, and subject to the usual brokerage of 2*s.* 6*d.* per share to myself." The board thereupon took the advice of their solicitors, who advised them by letter that there was no objection in law to the acceptance of those terms, provided the board were satisfied with the allottees, and that the brokerage was paid by the company and not deducted from the price of issue. Thereupon the board assented to the proposal, and later on the same day a letter was handed to them from *William Morris*, a stockjobber, who was the "client" referred to in *Pincoffs'* letter to the board, stating that he was willing to take 7500 shares at par and pay £2 a share at once, provided he had the option of taking at par, on or before the 23rd of June, the balance of the unallotted shares amounting to about 12,500, and also provided the board would allow commission on the whole number of shares taken by him, the commission on the 7500 to be paid at once; the commission on the shares to be paid to *Pincoffs*. It appeared from the evidence that *Morris* was known to the directors to be a stockjobber of very large means. A formal application followed, and on that same 23rd of May the directors allotted 7500 £10 shares to *Morris*, and paid £937 10*s.*—being 2*s.* 6*d.* per share—to *Pincoffs* as commission. Subsequently, about the 17th

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of June, they allotted the remaining 12,382 £10 shares to *Morris* and paid £1547 15*s.*—being 2*s.* 6*d.* per share—as commission to *Pincoffs*. They received from *Morris* £2 a share on these allotments, the sum so received amounting to nearly £40,000. On the 30th of June, 1882, *Philippart* was elected a director of the company. On the 11th of October, 1882, the board sanctioned and subsequently passed a transfer of about 19,528 shares from *Morris* to *Philippart*. They did this believing and being advised by their solicitor that the transfer was proper. The transfer was completed on the 18th of October. On the 19th of December, 1882, the directors other than *Philippart* resigned on the ground that at a meeting of the company held on the 6th of November a resolution had been passed sanctioning a scheme by *Philippart* of which they, the retiring directors, did not approve. A call of £1 a share had been made, and on the 3rd of January, 1883, *Philippart* and his new co-directors forfeited his shares, which were then about 18,500 in number, for non-payment of that call. Subsequently two other calls of £1 a share were made. On the 10th of April, 1883, *Philippart* became bankrupt. In July, 1884, the company was ordered to be wound up, and in the liquidation 30*s.* a share had been called up. The admitted debts of the company had all been paid. Claims to a large amount were outstanding which the liquidators were now resisting; and it appeared that there were some costs of the liquidation still to be provided for.

This summons was taken out by the liquidators, under sect. 165 of the *Companies Act*, 1862, against the former co-directors—five in number—who made the allotments to *Morris* and sanctioned the transfer to *Philippart*, including a director who had joined the board subsequently to the allotments but before the transfer, claiming, first, damages for alleged misfeasance in allotting the 7500 shares and 12,382 shares to *Morris*, as nominee of *Philippart*, or in allowing 18,500 of such shares to be transferred to *Philippart*; and secondly, that the Respondents might be ordered to repay the sums, amounting together to £2485 5*s.*, paid to *Pincoffs* for brokerage on such allotments, with interest. The summons also contained two other claims, which were dropped at the hearing.

Philippart was also named as a respondent to the summons, but, as he was a bankrupt, the case was not pressed against him at the hearing.

The Respondents, the former directors other than *Philippart*, were cross-examined at great length before one of the examiners of the Court upon a joint affidavit filed by them in opposition to the summons.

Sir *Horace Davey*, Q.C., and *Grosvenor Woods*, for the liquidators:—

It is not disputed that, where directors are acting within their powers, and are fairly exercising their discretion, the Court will not review their acts; but in this case there was no such exercise of discretion. By art. 28 it was plainly provided that no transfer should be made of a share not fully paid up except to a person who, upon due investigation by the directors, should satisfy them that he was a proper person to hold shares. This is is a case, not merely of negligence, but of gross breach of duty. The directors were bound, in the interests of the company, to use the judgment and discretion vested in them for an express purpose, and they had no power to accept a transfer of a share not fully paid up without exercising that judgment and discretion. Directors being in the position of agents for their company are bound, like any other agents, to use the same degree of diligence which persons of common prudence would use in their own affairs: *Story* on Agency (1). We submit that these directors, other than *Philippart*, against whom we claim nothing, are liable for the damages which the company sustained by reason of the acceptance of the transfer.

The directors are also liable for the sum which they paid to *Pincoffs* by way of brokerage. It was part of the bargain that brokerage should be paid. The payment of brokerage in respect of the placing of shares is beyond the powers of directors. It is analogous to issuing shares at a discount, and it is now settled that, where no agreement has been filed under the *Companies Act*, 1867, shares cannot be issued at a discount: *In re Almada and Tirito Company* (2). It can make no difference whether a sum

(1) 9th Ed. § 183. (2) 38 Ch. D. 415.

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per share is returned to the subscriber or to a person nominated by him; nor can it make any difference that the full amount is received in the first instance, and the return to the broker or other nominee made afterwards. "It is wholly wrong to make the company pay for the issue of its own shares. No part of the capital of the company could be properly so applied": *per* Court of Appeal in *Lydney and Wigpool Iron Ore Company* v. *Bird* (1). If it were lawful for a company to pay for the issue of its own shares, shares might always be issued at a discount by the subscriber agreeing to take them in consideration of the company making a payment to him. In *Marzetti's Case* (2), a director who voted for a payment for brokerage and commission on the company's shares was ordered to repay on the ground of misfeasance within sect. 165.

J. Henderson, for *Philippart*.

Ince, Q.C., *Buckley*, Q.C., and *Woodroffe*, for the other directors:—

No reasonable ground having been alleged for refusing the transfer of the shares from *Morris* to *Philippart*, the directors were bound to allow it: *Moffatt* v. *Farquhar* (3); *Robinson* v. *Chartered Bank* (4). The directors did not act with precipitation, but did what, after due consideration, they thought best for the company; they should not, therefore, be held liable for any loss. The Court will not press so hardly on honest directors as to make them liable for constructive defaults: *In re Forest of Dean Coal Mining Company* (5). To render directors liable, it is necessary to shew wilful negligence equivalent to fraud: *Rance's Case* (6); *In re Denham & Co.* (7); *Weir* v. *Bell* (8). "Misfeasance," in sect. 165, means misfeasance in the nature of a breach of trust: *Coventry and Dixon's Case* (9). The principle, as laid down in *Overend and Gurney Company* v. *Gibb* (10), is that you are not to expect from a director, in conducting the affairs of a company,

(1) 33 Ch. D. 85, 95.
(2) 28 W. R. 541.
(3) 7 Ch. D. 591, 610.
(4) Law Rep. 1 Eq. 32.
(5) 10 Ch. D. 450.
(6) Law Rep. 6 Ch. 104.
(7) 25 Ch. D. 752.
(8) 3 Ex. D. 238.
(9) 14 Ch. D. 660, 670.
(10) Law Rep. 5 H. L. 480, 494, 495.

the same measure of prudence which a Judge might, on an investigation in Court, consider he himself should have exercised under similar circumstances. In any case the directors' responsibility (if any) is in damages only, and the liquidators fail to shew any damage. There are no creditors here, for they have all been paid: the company is the only complainant, and they do not allege any damage.

As to the payments for brokerage, we submit that the directors were justified in making them. By their memorandum of association the company were authorized to do whatever they deemed "conducive to" the objects there specified; that is, they might do anything that might fairly lead up to the objects authorized by the memorandum, so long as they did not alter their original or primary business: *Simpson* v. *Westminster Palace Hotel Company* (1); *In re Baglan Hall Colliery Company* (2). A company may advertise and issue prospectuses: it cannot enter on its existence without capital: and surely you may pay those who are helping you to call into being a corporate life a commission for so doing. You naturally apply to those persons who from their financial position are able to float the company, and there can be no objection to paying such persons a fair commission for their services and their expenses properly incurred: *Bagnall* v. *Carlton* (3). In *Lydney and Wigpool Iron Ore Company* v. *Bird* (4) fees paid to brokers for their services in bringing out the company were allowed. The transaction is one in which a person in the position of a broker says to the directors, "I will ask my clients to subscribe for your shares provided you pay me a proper remuneration for my services." Such a transaction is perfectly valid. No doubt, the broker must not receive a bribe as an inducement to give his services, but if he renders a service he is entitled to receive payment for it. The test is service or no service. What the Court of Appeal meant in *Lydney and Wigpool Iron Ore Company* v. *Bird* (5) was that a company must not pay a man to induce him to become a shareholder; not that a company is not at liberty to pay a broker for helping them

(1) 8 H. L. C. 712.
(2) Law Rep. 5 Ch. 346, 356.
(3) 6 Ch. D. 371.
(4) 33 Ch. D. 85.
(5) 33 Ch. D. 95.

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to place shares. In *Marzetti's Case* (1) the reason the director was ordered to repay was because he had parted with the company's money improperly. Here it is not pretended that the directors were guilty of dishonesty or bad conduct. At the time when the directors paid the brokerage there was no decision that such a payment was illegal. They acted *bonâ fide* in paying the money and on the advice of their solicitor, and therefore they are not liable for what may now turn out to have been a mistake in law. In *London Financial Association* v. *Kelk* (2), V.-C. *Bacon* said the Court would not punish a director merely for a misapprehension of the law. A director should not be held liable under the strict rules applicable to trustees: *Marzetti's Case*. A director may be restrained from dealing with the company's funds in a particular way in the future, but it does not follow that he will be made liable for a misapplication of the funds in the past where he has acted honestly and in good faith: *Pickering* v. *Stephenson* (3); *Studdert* v. *Grosvenor* (4).

[KAY, J., mentioned *Joint Stock Discount Company* v. *Brown* (5).]

Sir *Horace Davey*, in reply:—

The object of art. 28 was to prevent impecunious and undesirable persons from holding shares, and to compel the directors to form a judgment respecting any proposed transferee. It required an affirmative judgment that he was a proper person —not merely a negative judgment that they saw no objection to him. The observations by V.-C. *Bacon* in *London Financial Association* v. *Kelk* (6) were only a *dictum*, and did not form the basis of his judgment. The same argument was urged, but unsuccessfully, before your Lordship in *In re Oxford Benefit Building and Investment Society* (7).

As to the brokerage, "conducive," in the memorandum of association, must be restricted to whatever is fairly ancillary to the special business of the company as previously defined: *Ashbury Railway Carriage and Iron Company* v. *Riche* (8). It refers to

(1) 28 W. R. 541.
(2) 26 Ch. D. 107, 146.
(3) Law Rep. 14 Eq. 322.
(4) 33 Ch. D. 528.
(5) Law Rep. 3 Eq. 139; Law Rep. 8 Eq. 381.
(6) 26 Ch. D. 146.
(7) 35 Ch. D. 502.
(8) Law Rep. 7 H. L. 653.

the "aforesaid objects," not to the capital of the company, which is dealt with by a subsequent paragraph. Payment by a company for the issue of its own shares is inconsistent with sect. 25 of the *Companies Act*, 1867, which requires the whole amount of every share to be paid for in cash. A company may pay the expenses of its formation, and may invite persons to take shares, but may not pay them to do so.

[KAY, J.:—A company may pay for advertisements inviting people to take shares. Why cannot it pay a broker for doing the same thing?]

If you can pay *A.* for inviting *B.* to take shares, I fail to see why you should not pay *B.* to take them. The payment of commission is a deduction from the amount payable on the shares, and thus contravenes the Act of Parliament. Instead of each share being issued at 20*s.* in the pound, it is issued at 20*s.* less the commission. There is no difference in principle in saying to a man, "If you become a shareholder, we will allow you 2*s.* 6*d.* per share," and "If you get a man to become a shareholder we will allow you 2*s.* 6*d.* per share." Whether you pay a man to induce him to become a shareholder, or pay a man to induce another to become a shareholder, you are not issuing each share at its full amount. Consequently this commission is not a payment which can properly be made within the memorandum of association. In considering the liability of the directors to repay it, honesty and good faith are immaterial. The amount must be repaid, simply because the payment of it was *ultrà vires*. That is the principle of *Pickering* v. *Stephenson* (1). The decision in *Studdert* v. *Grosvenor* (2) merely means that where the amount is insignificant the Court will not order its repayment; but here the amount is substantial, £2485 5*s.* Again, in each of those cases a shareholder was suing the directors on the ground of *ultrà vires*. In the former case the majority of the shareholders had from time to time sanctioned the payments, and the amount actually recoverable by the plaintiff was so small that the Court would not make an order for repayment against the directors. In the latter case also the amount was small, and the payments

(1) Law Rep. 14 Eq. 322. (2) 33 Ch. D. 528.

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had from time to time appeared in the published accounts of the company without any objection, and therefore it might be presumed that the shareholders had condoned, so far as they could do so, the misapplication of the company's money. It is different in the case of a liquidator suing. He is bound to get in all moneys that may be due to the company, and stands in a wholly different position from that of a shareholder who is suing for a sum the application of which his fellow-shareholders have condoned.

1888. Nov. 13. KAY, J.:—

The liquidators of this company, which is being wound up, have taken out the present summons against certain gentlemen who were formerly directors of the company, under sect. 165 of the *Companies Act*, 1862, seeking to make them personally liable for alleged misfeasances as such directors. No imputation whatever is made upon the honesty or honourable conduct of any of these gentlemen, but it is alleged that they have committed breaches of trust in making certain payments out of the moneys of the company and in permitting the transfer of certain of its shares.

These questions involve a consideration of what is the real position of the directors of a joint-stock trading company. With respect to the capital of the company which is under their management, it has been said that they are "*quasi*-trustees" for the company: *Flitcroft's Case* (1). In that and other respects they are, "to a certain extent, trustees" (*Lindley* on Partnership) (2). In the language of Lord *Romilly*, in *York and North Midland Railway Company* v. *Hudson* (3), "The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely." They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will. One obvious distinction is that the property of the company is not legally vested in them. Another

(1) 21 Ch. D. 519, 534. (2) 4th Ed. p. 587.
(3) 16 Beav. 485, 491.

and perhaps still broader difference is that they are the managing agents of a trading association, and such control as they have over its property, and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house to whom the control of its property and very large powers for the management of its business are confided; but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control, except the action of the shareholders of the company. However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent. In *In re Forest of Dean Coal Mining Company* (1) Sir *G. Jessel*, M.R., said: "Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners. It does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it. . . . . They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners." In *Smith* v. *Anderson* (2) Lord Justice *James* said: "The distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare,

(1) 10 Ch. D. 451, 453. (2) 15 Ch. D. 275.

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exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors."

If directors apply money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust. On the other hand, if they apply the money of the company or exercise any of its powers in a manner which is not *ultrà vires*, then a strong and clear case of misfeasance must be made out to render them liable. Lord *Hatherley*, in *Overend & Gurney Company* v. *Gibb* (1), intimates that in such a case their conduct must amount to *crassa negligentia*. In *Marzetti's Case* (2), a definite test is applied. Lord Justice *James* said:—"A director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees." And he intimates that the negligence for which a director would be held liable must be such as would make a managing director of a business liable to his employers. Lord Justice *Brett* said the director must be "guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law:" and with this Lord Justice *Cotton* concurs. That is the law which must be applied to the circumstances of this case. [His Lordship then stated the facts of the case, and continued:—]

I will deal with the claims made by the liquidators in the order in which they are made. It has not been attempted at the bar to urge that the directors are liable in respect of the allotment to *Morris*. *Morris* was a very substantial person, and I have no

(1) Law Rep. 5 H. L. 487. (2) 28 W. R. 542, 543.

reason to doubt that the allotment to him was an advantage to the company. He paid £2 a share, and was liable for the uncalled £8 on all the shares allotted to him. The stress of the argument on the first point related to the transfer to *Philippart*, as to which the case is put, as I understand, in two ways. It is urged that the directors did not in fact "approve" *Philippart* as a transferee under art. 28. That is, although they allowed the transfer to him, they did not exercise the judgment and discretion which they were bound to exercise according to that article. And the second contention upon this point is that, if they did, the transaction was so utterly improper that it amounted to a gross breach of duty for which they may be rendered liable. [His Lordship then went through the evidence on this part of the case, pointing out that the proposed transfer to *Philippart* was well considered by the board, that they were advised by their solicitor that there was no valid objection to be made to it, and that in sanctioning the transfer they acted upon the best knowledge they had at the time as to *Philippart's* financial position and responsibility, which they believed were such as to justify their sanctioning the transfer. His Lordship then proceeded :—]

Anything like corruption or dishonesty on the part of the directors being out of the question, I am unable to treat them as responsible for the consequences of permitting this transfer. Even if the act was, with the knowledge which they had at the time, a grave error of judgment, that is not a ground upon which the Court could properly hold them liable.

Upon the second point I have felt much more difficulty. It was said in argument against the directors that the payment of brokerage to *Pincoffs* was analogous to issuing the shares at a discount. The analogy seems to me imperfect. In *In re Almada and Tirito Company* (1) the Court of Appeal held that issuing shares at a discount was *ultrà vires*, because it would in effect be altering the amount of the capital of the company in a manner not authorized by the *Joint Stock Companies Act*, and was equivalent to returning part of the capital to the allottee. Payment of brokerage to a person not the shareholder implies a receipt from the shareholder of the full amount payable on the shares, and

(1) 38 Ch. D. 415.

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then an application either of part of the money so received or other moneys of the company in paying the brokerage. The real question is, whether such an application of capital is within the power of the company. If the payment be completely *ultrà vires*, then the directors who made it are liable as for a breach of trust, unless the case comes within that rather exceptional class which I had to consider in *Tomkinson* v. *South-Eastern Railway Company* (1), where the payments were treated as being within the general power of the directors as managers, although not in the strictest sense payments for any of the objects mentioned in the memorandum. In this case there is nothing whatever in the memorandum of association which would justify such a payment except the words "to do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company." The "aforesaid objects" do not include the issue of the company's shares. But it is argued that the first thing which a newly-formed company has to do is to invite and encourage persons to take shares. For this purpose, it is said, they may print and issue prospectuses and they may advertise: why should they not employ agents to travel about the country and invite persons to join? If they may, such agents must be paid for their services; and where is the difference between that and giving a commission to some one, like a broker, who has a large number of clients whom he may induce to take shares in the company? I am not satisfied that such employment of agents would be legitimate; but, if it were, it seems to me that there is a difference, and an important one. Payment of what is called brokerage for placing shares is not really payment for work and labour. It is a commission—that is, a bonus to *A.* to use his influence to make *B.*, *C.*, and *D.* shareholders. Put the simplest case. *A.* says to the directors, "I know a wealthy man whom I can persuade to take 10,000 of your shares; give me £200 and I will induce him to do so." Would that be a legitimate payment? This practice, so far as it exists, has grown up from the launching of bubble companies which could not be brought out without the aid of speculators, who insist on being paid a bonus or commission

(1) 35 Ch. D. 675.

for their help. In the case of an enterprise which is favourably received by the public not a penny need be spent in this way. It is only companies which are unsound, or at any rate unpopular, which resort to such devices. In this very case four of the five directors in their joint affidavit state that when *Pincoffs'* offer was made the company's shares were unsaleable at par, and that, accordingly, they thought it beneficial to accept his terms. That is a distinct statement that, unless speculators were paid out of the company's capital to place the shares, there was no chance of issuing them. In my opinion such a course of proceeding is calculated to lead to a great amount of evil in the commercial world. It ought to be discouraged. These are considerations which must be regarded in determining whether such a payment is *ultrà vires*.

Another consideration is this. The question does not depend on the amount paid unless it were so large as to suggest *mala fides*. If 2*s*. 6*d*. a share may be paid, why not 5*s*., 10*s*., or £1? The more needy the company the greater must be the payment. The more hopeless the enterprise the larger would be this kind of outlay. The terms of *Morris's* letter of the 23rd of May, 1882, in which he insisted on the payment of a commission to *Pincoffs*, suggest a suspicion that this commission would be some pecuniary advantage to him. It is but a suspicion. I have no evidence that such was the case, but I refer to it as an obvious danger which would result from such a practice. A commission to *Morris* would, in effect, be issuing shares at a discount. Giving a commission to brokers may in this way be a roundabout mode of returning part of the capital to the allottee.

The capital of the company is placed under the control of the directors for the purpose of carrying on the business of a trading concern. In any expenditure concerning its proper business the Court treats them as having a large discretion. A moderate expenditure in launching the company—that is, in introducing it to the notice of the public to invite them to join—though not part of the trading business, may be treated as "conducive" thereto. It is not easy to draw a definite line as to every payment of this kind. But a company cannot employ the capital which has been subscribed for the purposes of its business in

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making payments to induce persons to take shares to such persons themselves. Can it be legitimate to make such payments to another who has influence over them? Is that such an application of the capital of the company as a general meeting could sanction? Suppose such a meeting called, and the directors were to say to it, "We have tried all the ordinary means of inducing the public to take shares and failed. By paying a bonus to influential members of the *Stock Exchange*, or influential solicitors or bankers, we can get them to persuade their clients to take further capital: sanction our doing this." Could a general meeting validly decide that the capital subscribed to carry on the business of the company should be so applied? Without using the word in any offensive sense, the objection to such payments is that they partake of the nature of a bribe. The broker or agent is paid to give advice and use persuasion which, presumably, he would not do without such payment. Suppose the broker to say candidly, "I think badly of the prospects of your company. I would not take a share in it myself, but pay me, and I will find you some foolish people who will do so under my persuasion." Would that be a legitimate thing to do? Yet something of this kind is necessarily involved in every such case.

In my opinion, the payments to *Pincoffs* of 2*s.* 6*d.* for every share taken by *Morris* were *ultrà vires*; that is, they were an application of the subscribed capital which could not be sanctioned by a general meeting.

I have dealt with this question entirely on principle. The actual point does not seem to have arisen before for decision. Two cases have been referred to which have some bearing upon it. In *Lydney and Wigpool Iron Ore Company* v. *Bird* (1), *Bird & Co.*, iron merchants, had given a guarantee before the company was formed to Messrs. *Allaway* in consideration of a commission of £10,800, by which they purported to "guarantee and provide for the subscription required from the public to complete the capital," and to make other payments. The company was registered on the 30th of December, 1871, and subsequently, on the 9th of January, 1872, the agreement as to the guarantee was adopted and modified to this extent—that the

(1) 31 Ch. D. 328.

guarantee was given by *William Bird* alone, and £5000 of the £10,800 was to be paid to him as a consideration for his giving the guarantee, the remainder of the £10,800 being retained by *James Bird*, a former partner in the firm, of which *William Bird* had ceased to be a member. The action was brought against *William Bird* and *James Bird* to recover the £10,800. The Court of Appeal (1) held that *James Bird* was liable for the whole £10,800 subject to just allowances; and, on the question whether he could be allowed the £5000 he had paid to *William Bird*, the Court said: "It appears to us wholly wrong to make the company pay for the issue of its own shares. No part of the capital of the company could be properly so applied. To allow *James Bird* the £5000 paid by him to *William Bird* for his guarantee would, in effect, be to make the company misapply its capital." Those words are large enough to include the present case, and I must observe that they occur in a considered judgment, delivered for the Court by Lord Justice *Lindley*, who has paid very great attention to this branch of the law. But I do not rely on them too much, because distinctions may be drawn between the guarantee in that case and the agreement for commission in this. I have, therefore, preferred to rest my decision upon the reasons which I have given.

On the other hand, reference is made to *Bagnall* v. *Carlton* (2) which was a suit against certain promoters of a company seeking to set aside an agreement for the purchase by the company of certain property, and asking repayment of the purchase-moneys after deducting such sum as should be declared by the Court to be a fair allowance for commission and expenses. The Court held that the company, who were plaintiffs, were bound by the offer made in their pleadings to allow something to the defendants by way of commission for their trouble in promoting the company, Lord Justice *James* saying that it was clear the defendants were not entitled to commission in any way whatever except by reason of the offer made in the bill. No question was raised as to such a payment being beyond the powers of the company, and I do not see how there could have been any such question, because the Court was imposing on the plaintiff company certain terms

(1) 33 Ch. D. 85, 95. (2) 6 Ch. D. 371.

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as the price of the relief it was granting, and the order of the Court would be sufficient whether the payment was within the company's powers or not. It seems to me impossible to treat that case as a decision of this question.

I must declare that the Respondents, the directors who made these payments to *Pincoffs*, are jointly and severally liable to repay the same to the company, with interest at 4 per cent. per annum since the moneys were paid.

It has been suggested that the Court should follow the example set by Vice-Chancellor *Wickens* in *Pickering* v. *Stephenson* (1), by declining to order repayment by the directors. In that case and in *Studdert* v. *Grosvenor* (2), in which it was followed, the amount was very small, and the interest of the applicant in that small amount was almost infinitesimal. Here the amount is considerable, and the liquidators who apply represent the whole body of shareholders, whose liability will be lessened if this money is recovered. The Respondents—other than *Philippart*, against whom no relief is asked because he is insolvent, and the director who did not become a director till after the allotment of these shares—must be ordered jointly and severally to repay the amounts paid to *Pincoffs*, with interest at 4 per cent. I must refuse the summons with costs as to all the claims except the second, which I allow with costs, such costs to be set off. I must direct the Taxing Master to allow to the director I have last-mentioned any separate costs which may have been incurred—that is, any increase of the costs—by making him a Respondent. The liquidator may take any costs out of the estate which will remain after the set-off, except that I must direct the Taxing Master to disallow any costs of the cross-examination which he may consider excessive.

Solicitors: *Snell, Son, & Greenip; Campbell, Reeves, & Hooper; Merrick & Co.*

(1) Law Rep. 14 Eq. 322. (2) 33 Ch. D. 528.

G. I. F. G.

In re VALDEZ'S TRUSTS.

KAY, J.

1888

Nov. 24.

Will—Construction—Residue—Intestacy—Gift of Residue to Executors or Administrators of M. and J.—Gift of Residue by J. to Testator.

A testator gave his residuary estate to *M.* and *J.*, and in case of their decease bequeathed what he had bequeathed to them to their executors or administrators. *M.* and *J.* both predeceased the testator. *J.* by her will bequeathed to the testator the residue of her property, which comprised the property devolving on her representatives under the testator's will:—

Held, that in the events which had happened, one moiety of the testator's residuary estate was undisposed of by his will.

PETITION.

Pedro d'Alcantara Travasses Valdez, who died on the 5th of June, 1887, by his will, dated the 17th of November, 1851, after making certain specific bequests, continued as follows:—"I bequeath and devise all my real and personal property, except any land in the Portuguese territories, to *Mary Hunter* and *Jemima Hunter*, spinsters, of 14, *Piccadilly*, *Westminster*, except as hereinbefore mentioned, and appoint the said *Mary* and *Jemima* the executrixes of this my will, and in case of the decease of the said *Mary* and *Jemima* I bequeath what I have bequeathed to them to their executors or administrators, and appoint these last my executors."

Jemima Hunter died in the lifetime of the testator *Valdez*, namely, on the 21st of June, 1855. By her will, dated the 6th of November, 1851, after making certain specific bequests, she gave, devised and bequeathed all the residue of her property to *Valdez*.

Mary Hunter also died in the lifetime of *Valdez*, namely, on the 27th of October, 1876. By her will, dated the 10th of January, 1876, after making certain specific bequests, she gave the residue of her estate and property to the Petitioner, to whom letters of administration with the will annexed were granted on the 28th of July, 1877.

On the 15th of July, 1887, the Petitioner, being, in his capacity of administrator of *Mary Hunter*, executor appointed by the will of *Valdez*, duly proved that will.

On the 23rd of August, 1887, letters of administration, with

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the will of *Jemima Hunter* annexed, of her personal estate and effects left unadministered were granted to the Petitioner.

All the debts of *Jemima Hunter* had been paid and satisfied, so that property devolving on her representatives under the will of *Valdez* formed part of her residue.

A question arose as to the proper construction of the will of *Valdez*, so far as related to the one moiety of his residuary estate which passed under the will of *Jemima Hunter*, such moiety being claimed on the one hand by the Petitioner as the administrator and residuary legatee of *Mary Hunter*, and on the other hand by the Respondent, who was one of the next of kin of *Valdez*, on behalf of himself and the other next of kin.

The Petitioner was unable to ascertain who were the next of kin of *Valdez*, but they were believed to be persons resident in *Portugal* or elsewhere out of the jurisdiction of the Court.

The Petitioner, under the provisions of the *Trustee Relief Act* (10 & 11 Vict., c. 96), paid into Court the sum of £1183 3*s.* 5*d.*, representing one moiety of the residuary estate of *Valdez*, and now presented this petition asking that such sum might be paid out to him. By an order made in Chambers the Respondent was appointed to represent all the next of kin of *Valdez*.

Marten, Q.C., and *Martin Ware*, for the Petitioner:—

The bequest in the will of *Valdez* to the executors or administrators of *Mary* and *Jemima* was a gift in joint tenancy, and, as *Mary* survived *Jemima*, the Petitioner, in right of *Mary*, is entitled to this fund, as part of *Mary's* estate. If, however, that be not the true construction of the gift, then it can only be read as a substitutionary gift to the estates of *Mary* and *Jemima* in equal moieties, which takes effect by reason of their having both died in the lifetime of the testator. *Jemima* has in effect given one moiety back to the testator, which therefore passes under his will in moieties between the estates of *Mary* and *Jemima*, and so on continuously, until the share attributable to *Jemima's* estate becomes infinitesimally small, and the whole in effect passes to the estate of *Mary*.

Ince, Q.C., and *Alexander Young*, for the Respondent:—

In the events which have happened *Valdez* died intestate as to

the moiety now in question. It is clear that a gift to the executors or administrators of a deceased person is a gift to them to be dealt with as part of the estate of the deceased: *Long* v. *Watkinson* (1); *Theobald* on Wills (2). The office of executor or administrator being perpetual, there can be no survivorship as between the two estates of *Mary* and *Jemima*, and joint tenancy is therefore out of the question. This moiety passes under the will of *Valdez* to *Jemima's* representative, who, under her will, has to deal with it by handing it over to *Valdez* himself. But *Valdez* has died, and the moiety which he would take if living is not disposed of by his will. When *Valdez* died his will operated and took effect as to this moiety once for all; the moiety which came back to him under the will of *Jemima* did not so come until after his death.

[KAY, J.:—Did not it come back actually at the moment of his death, which was also the moment of the operation of his will?]

No. If there had been unpaid creditors of *Jemima* it would have belonged in the first instance to them. It comes back to *Valdez* in a new right and as a new property. When it is handed over by the representative of *Jemima* to the representative of *Valdez* the latter finds in *Valdez's* will no disposition of it, because the disposition of residue in that will has already operated, and its force is spent. The will of a testator operates on property which he has at the last moment of his life, and *Valdez* did not get this legacy from *Jemima quâ* legacy until after his death.

Moreover, if the contention of the Petitioner were right this absurd result would follow, that each time the moiety revolved probate duty and legacy duty would be payable out of it under the will of *Valdez*.

Marten, in reply:—

The will of *Valdez* operated at the instant of his death, and at that instant the right to this property under the will of *Jemima* accrued.

[KAY, J.:—Is not the effect of your argument this, that *Valdez*

(1) 17 Beav. 471. (2) 3rd Ed., p. 268.

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has in fact given this moiety to the representatives of *Jemima* in trust for *Valdez* himself?]

No. That would be equivalent to his declaring an intention to die intestate, which he has not done. Moreover, the moiety is by the terms of the gift subject to all the obligations attaching to the estate of *Jemima*. As to the argument in reference to probate and legacy duties, it is for the Government to claim those duties if they are entitled to them. The fact that they become payable cannot affect the construction of the will. The result may be a whimsical one, but the Courts have had to deal with that difficulty in similar cases, and have arrived at a conclusion similar to that for which we contend: *Atkinson* v. *Jones* (1); *Evans* v. *Field* (2). This case is clearly distinguishable on the one hand from cases in which the testator expresses a wish to die intestate, and on the other hand from those in which there is a specific gift to a person who dies in the testator's lifetime.

KAY, J.:—

In this case the testator *Valdez* gave all his real and personal property with certain exceptions to *Mary Hunter* and *Jemima Hunter*, and appointed the said *Mary* and *Jemima* the executrixes of his will. Pausing there, it is clear that that would be a gift in joint tenancy to them, and that on the death of either the survivor would take. But the will continues thus: "And in case of the decease of the said *Mary* and *Jemima* I bequeath what I have bequeathed to them to their executors or administrators, and appoint these last my executors." *Mary* and *Jemima* both died in the lifetime of the testator. It seems to me to be plain that the words "in case of the decease of the said *Mary* and *Jemima*," refer to their death in the lifetime of the testator, and accordingly the gift over has taken effect, and the literal effect of it is to give to the executors or administrators of each of them, *Mary* and *Jemima*, as part of her personal estate, one-half of this property. The executors or administrators cannot be joint tenants, or at least, if they be joint tenants, there cannot be survivorship between them, because the office of executor or administrator is

(1) Joh. 246, 252. (2) 8 L. J. (N.S.) (Ch.) 264.

immortal. Accordingly the executors or administrators of *Mary* and *Jemima* are the persons entitled in equal moieties under the gift. The peculiarity of the case is that *Jemima*, by her will, has given the residue of her property to this testator himself, and the argument is that one moiety of the property has come back in that way to him, and must be treated as part of his estate, and must accordingly go, under the residuary gift, in moieties again, and so on *ad infinitum*, until it is practically exhausted, and the result would be that *Mary Hunter's* representatives would take the whole. Now is that the proper mode of dealing with it? The matter seems a little puzzling at first, but the answer to the argument appears, on consideration, to be reasonably clear. I will illustrate it in this way. Suppose *Valdez* had given the residue of his estate to the trustees of a settlement, and that under that settlement *A.* and *B.* were absolutely entitled as tenants in common, and that *A.* died in the testator's lifetime, could *A.* take under the gift? If he had given it to trustees expressly in trust for *A.* and *B.* equally, then it is obvious that if *A.* had died in his lifetime there would have been a lapse. *A.* would be a legatee; it would not matter that he took merely a beneficial interest; he would be none the less a legatee, and if he died in the lifetime of the testator there would be a lapse. Then try it in this way. Suppose the gift had been to the executors or administrators of *Jemima* in trust for the testator himself. It is quite obvious that the part of his estate so given would be undisposed of; and that is practically what the gift here comes to. This is, in the events which have happened, as the property is not wanted to pay the debts of *Jemima*, in effect a gift to the executors or administrators of *Jemima*, under the will of *Valdez*, of one-half of his residuary property in trust for *Valdez* himself. That half, therefore, is not disposed of by the will. If the matter is looked at from any point of view it comes to the same result. The will speaks from the moment of the death. This property would not come back to *Valdez* except under his own will, by the gift in trust for himself, and therefore it comes back after the point of time at which the will has spoken, and if it be treated as part of the estate it is a part of the estate which he has not disposed of by his will. Therefore

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I am clear that the argument which has been addressed to me on the part of the Petitioner fails, and that this moiety which was given to *Jemima's* executors or administrators, so far as it is not wanted for the purposes of the administration of her estate amongst her creditors, and so far as it belongs to *Valdez* himself, as residuary legatee under her will, has lapsed, and goes to the next of kin of *Valdez*. I am much obliged to Mr. *Young* for his ingenious argument, which I think illustrates the absurdity of the contrary construction, that if this moiety comes back to *Valdez*, so as to be dealt with as part of his property, it must pay probate duty again, and that every moiety which comes back again and again, until it vanishes by becoming infinitesimally small, must, each time it comes back, pay probate duty—and legacy duty also, I suppose. That is not at all a bad way of illustrating the absurdity of any other view of the case. I am of opinion that this moiety to which *Valdez* himself became entitled as legatee of *Jemima*, was undisposed of by his will and belongs to his next of kin, and there must, therefore, be a declaration that such next of kin are entitled to the fund in Court, and an inquiry who they are.

Solicitors: *Woodrooffe & Burgess; Kearsey, Hawes & Walsh.*

C. C. M. D.

SMART *v.* TRANTER.

KAY, J.
1888
Dec. 6, 15.

[1888 S. 237.]

Married Woman—Chose in Action—Title of Husband—Probate of Will of Married Woman having no Testamentary Capacity—Action by Husband against Executor in Chancery Division—Jurisdiction—Probate Rules, 1887 *—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 34 [*Revised Ed. Statutes, vol. xvii., p.* 82].

A married woman, who was entitled to *choses in action*, but had no separate property and no testamentary capacity by assent of her husband or otherwise, made a will whereby she appointed executors, and gave her property away from her husband. Probate of the will having been granted in the ordinary form to one of the executors, the husband brought an action against him in the Chancery Division claiming the *choses in action* :—

Held, that the husband, suing the executor in this Court, must treat the will as valid, and that in order to establish his right to the *choses in action*, his proper course was to take proceedings in the Probate Division to recall the probate and obtain administration to his deceased wife.

THE Plaintiff in this action was married to his late wife in April, 1882, before the *Married Women's Property Act*, 1882, came into operation.

His wife was entitled to a legacy of £50, payable on the decease of her mother, and also to a sum of £100 which was due from her brother to her, but was not reduced into possession by the Plaintiff.

There was no settlement made on the Plaintiff's marriage. The Plaintiff's wife died on the 3rd of July, 1887, having made a will dated the 26th of July, 1886, whereby she appointed executors, and left, or purported to leave, all her property upon trust for her mother for life, with remainder to her brothers and sisters.

The Plaintiff entered a *caveat* against the proof of this will, which he afterwards withdrew, and on the 14th of November, 1887, probate of the will was granted to the Defendant, one of the executors, according to the practice introduced by the Probate Rules of March, 1887, rr. 15 and 18; viz., in the ordinary form, without any exception or limitation.

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The Plaintiff brought this action, alleging that his wife had no power to dispose of the sums of £100 and £50, or any part thereof, by will, without his assent, which assent had never been given, and claiming that the Defendant should assign, transfer, and pay the sum of £100, and assign and transfer the legacy of £50 to the Plaintiff, and an injunction to restrain the Defendant from dealing with or disposing of the £100 and £50 otherwise than by assigning, transferring, and paying the same respectively to the Plaintiff.

It appeared that the Plaintiff's wife had no separate property and no testamentary power of appointment in respect of any property.

Marten, Q.C., and *Nalder*, for the Plaintiff:—

Under the new Probate Rules of March, 1887, probate is granted to the executor appointed by the will of a married woman without any inquiry as to her testamentary capacity, and it is left to the court of construction to determine the rights of the persons entitled to the property of the married woman. This was the reason why the *caveat* entered by the Plaintiff was withdrawn. The will in this case was a nullity, as the married woman had no power to make it, and the Defendant, who as executor can derive title only under the will, has no title to these *choses in action* as against the Plaintiff.

Eustace Smith, for the Defendant:—

The Defendant is the duly appointed executor of this testatrix, and as such, invested with the administration of the whole of her estate; and the Plaintiff's right must necessarily be subject to the Defendant's costs of administration.

[KAY, J.:—Could this married woman, who had no property of her own, and was not herself an executrix, appoint an executor?]

It is submitted she could under the new rules.

[KAY, J.:—The new rules do not alter the law.]

Before the new rules the Plaintiff would have had to apply to

the Court of Probate to be appointed administrator of any property not passing under his wife's will; he would come as of right to take out administration, but would take the property as administrator, that is, as the mere officer of the Court, and be sworn as any other administrator. Now, instead of making a grant *cæterorum* to the husband the Court grants probate to the executor. A married woman had always power to make a will; and even where she had no separate estate her will was admitted to probate for the purpose of continuing the representation to an estate of which she was executrix: *Williams* on Executors (1); whether property could pass under the will is a separate question.

[KAY, J.:—There was no jurisdiction to grant probate of her will unless it was made with the license and assent of the husband: *Willock* v. *Noble* (2).]

If there was any property (and there must, it is submitted, have been some) of the married woman on which the will could operate the probate would be effectual, until set aside by the proper Court.

[Reference was also made to *Pike* v. *Fitzgibbon* (3); and *In re Lambert's Estate* (4).]

Marten, in reply:—

[KAY, J.:—Ought you not to take proceedings in the Probate Division to recall the probate? By suing the Defendant in this Court you admit his title as executor.]

The Plaintiff is entitled to a declaration that these two sums did not form part of the estate of his deceased wife but belong to him.

1888. Dec. 15. KAY, J. (after stating the facts of the case, continued:—)

The Plaintiff now brings this action against the executor claiming the £100 and the £50 on the ground that his late wife had no power to make a will. Upon the evidence it appears

(1) 7th Ed. p. 53; see 8th Ed. pp. 54, 55.
(2) Law Rep. 7 H. L. 580.
(3) 17 Ch. D. 454.
(4) 39 Ch. D. 626.

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clear that the wife had no separate estate, and no testamentary capacity by assent of the husband or otherwise.

A will made under such circumstances is treated generally as a nullity: *Tucker* v. *Inman* (1); *Williams* on Executors (2); and the former practice was to refuse probate. Now it is said that probate is granted even where the woman was married before the *Married Women's Property Act* 1882 came into operation, without inquiry as to her testamentary capacity.

But the husband cannot recover *choses in action* belonging to the wife without taking out administration to her: *Williams* on Executors (3); *Proudley* v. *Fielder* (4); and if he should die without having done so his administrator must obtain administration to the wife before he could recover: *Partington* v. *Attorney-General* (5).

The proper course for the husband in this case is to take proceedings to recall the probate, and to obtain administration to his deceased wife, and I have the authority of Mr. Justice *Butt* for saying that the withdrawal of the *caveat* will be no bar to his doing this.

But I have no power to give him any relief in this action. It is said that an executor derives title not from the grant of probate, but from the will—*Williams* on Executors (6); *Hensloe's Case* (7)—and if the will be a nullity probate can make it no better. Anyone however suing here an executor who has obtained probate must admit the validity of the will, because this Court—*Attorney-General* v. *Ryder* (8); *Jones* v. *Jones* (9)—accepts the probate as conclusive in the case of a will of personal property, and if this will be valid, the husband can have no claim whatever.

Sect. 34 of the *Judicature Act*, 1873, assigns this branch of the business of the High Court to the present Court of Probate.

The Plaintiff seems to me to have completely mistaken his remedy. Suing the executor in this Court he must treat the will as valid, in which case he has no title. This Court cannot recall

(1) 4 Man. & G. 1049, 1076.
(2) 6th Ed. p. 51; 8th Ed. p. 53.
(3) 6th Ed. p. 815; 8th Ed. p. 879.
(4) 2 My. & K. 57.
(5) Law Rep. 4 H. L. 100.
(6) 6th Ed. p. 282; 8th Ed. p. 297.
(7) 9 Co. 38 a.
(8) 2 Ch. Ca. 178.
(9) 3 Mer. 161, 171.

the probate and grant him administration to his wife. That can only be done by the Court of Probate. It is only by applying to that Court that he can establish his right to his late wife's *choses in action.*

I must dismiss this action with costs.

Solicitors: *Collyer-Bristow, Withers, Russell & Hill, for Wood & Awdry, Chippenham; Morse Hewitt & Farman, for A. W. Boodle, New Swindon.*

C. C. M. D.

NORTH, J.

1888

June 29;
July 31.

HENDERSON *v.* BANK OF AUSTRALASIA.

[1888 H. 2210.]

Company—Bank—Power of Meetings—Pension—Deceased Officer.

A resolution by a meeting of proprietors of a bank authorizing the directors to pay a half-yearly pension for five years for the benefit of the family of a deceased officer:—

Held, intra vires.

THE *Bank of Australasia* was originally established by deed of settlement, dated 1834. It was subsequently incorporated by charter, which confirmed the deed of settlement. The deed, modified by special resolutions passed in accordance with the provisions of the deed, regulates the constitution of the bank.

The objects of the bank are the establishment of banks and the carrying on the business of bankers in the colonies of *Australasia*. The management of the bank is vested in a board of directors subject to the general control by meetings of proprietors. Article 25 of the deed of settlement provides: "That in addition to the powers hereinbefore given, the general meetings shall (subject and without prejudice to the previously existing rules of the society or copartnership) have full power to superintend, regulate and control all the affairs and concerns of the society or copartnership and (except where any particular general meeting or meetings is required for the purpose) any business, matter, or thing relating to the society or copartnership may be transacted or agitated at any general meeting."

Article 56 provides for the daily meeting of the directors or any three of them in *London* or *Middlesex* as a committee "for the purpose of transacting, managing, or superintending any of the affairs or concerns of the society or copartnership."

Article 83 gives the directors "subject and without prejudice to the powers hereinbefore given to general meetings," absolute control over the management of the affairs of the bank.

An annual general meeting of the bank was held on the 5th of April, 1888. At that meeting a resolution was passed: "That the directors are hereby authorized to grant to the family of the

late Mr. *E. S. Parkes*, in recognition of his eminent services to the bank for twenty years, a pension of £1500 a year for a period of five years commencing the 10th of October, 1887, such pension to be paid in equal half-yearly instalments of £750 each, to be distributed among his sons and daughters in such manner as the directors may think fit."

The notice of the meeting specified as purposes of the meeting the receiving the annual report, and the election of directors, and nothing further. Printed accounts and the proposed report were issued about a week before the meeting took place.

The report contained the following intimation:—

"The proprietors will be asked at this meeting to make a special grant to the family of the late Mr. *E. S. Parkes* in recognition of the eminent services which he rendered to the bank during nearly twenty years; for more than ten of which, as colonial superintendent, he occupied the most responsible position in its management."

Mr. *Parkes* was killed in a railway accident, in May, 1887, on a local railway, on his way home from his daily business at the offices of the company at *Melbourne*. At the time of his death he was the chief officer of the bank in the Colonies. He was in receipt of a salary of £3500. He left his family a considerable fortune, including compensation from the Colonial Government, as owners of the railway, in respect of the accident, and a sum, in the nature of insurance, out of the provident fund of the bank.

This was an action by a proprietor against the bank for a declaration that the resolution above referred to was *ultrà vires*, and for an injunction to restrain the Defendants from applying their funds in paying to the family of Mr. *Parkes* the sum of £7500, or any other sum.

The action was brought on on motion for an interlocutory injunction, which was treated as the trial of the action.

There was evidence on the part of the Defendant bank to shew that it was in accordance with the custom of other banks, and was considered beneficial by persons acquainted with banking business of the nature of the Defendants' business, that retiring servants and the families of deceased servants should be treated

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with liberality, and that special grants should, upon proper occasions, be made in their favour. There was evidence on the part of the Plaintiff that he had in answer to a circular received a large number of expressions of disapproval of the resolution by proprietors, and had received scarcely any expressions of approval. The evidence is sufficiently detailed in the judgment.

Crackanthorpe, Q.C., and *J. Henderson*, for the Plaintiff:—

A majority of shareholders have no power to vote away the money of their company for an object not within the scope of their business, even though they may be of opinion that the application of the money may be indirectly advantageous to them: *Hutton* v. *West Cork Railway Company* (1); *Tomkinson* v. *South-Eastern Railway Company* (2). The voting of money to the family of a deceased well-paid officer who are otherwise well provided for can be of no benefit to the business of the company, and is a bad precedent. The granting of a pension to a retiring officer stands on a different footing. If other companies have given gratuities to the families of deceased officers they may have had express power to do so, their doing so cannot affect the Defendants.

An objection to the granting of this pension is that it extends over a considerable time, and is in effect a pledging of future earnings.

The Plaintiff has evidence tending to shew that the resolution does not express the real view of the company.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Defendants:—

Even without asking the consent of the proprietors the directors may exercise a wise liberality in spending money outside the letter of the objects of the power where their doing so is advantageous to the welfare of their company, *à fortiori* can they do so with the sanction of their proprietors: *Taunton* v. *Royal Insurance Company* (3); *Attorney-General* v. *Great Eastern Railway*

(1) 23 Ch. D. 654. (2) 35 Ch. D. 675.
(3) 2 H. & M. 135.

Company (1); *Hampson* v. *Price's Patent Candle Company* (2). In the latter case extra gratuities were given to the servants of a company, and it was considered that it was for the benefit of the company in holding out an inducement to faithful service. In this case it is for the benefit of the company that it should be known that they treat well the families of their best servants. There is evidence to shew that the act of the company now complained of is customary among banking companies and beneficial.

In the case of *Hutton* v. *West Cork Railway Company* (3) the business had ceased, and the proposed expenditure could be of no benefit. In the case of *Tomkinson* v. *South-Eastern Railway Company* (4) the object of the proposed expenditure was too remote to bring a corresponding benefit, and was altogether away from the business.

Crackanthorpe, in reply.

1888. July 31. NORTH, J. (after deciding on the construction of the company's deed of settlement that sufficient notice of the meeting had been given to enable the particular business to be transacted, continued) :—

Then the next question is, whether the resolution itself is *ultrà vires* and not within the powers of the company. Now the first thing to be noticed is, that there is no suggestion that what was done was a mere device for the purpose of accomplishing something clearly outside the powers of the company. It was a *bonâ fide* proposal that the allowance should be made to Mr. *Parke's* family. It was recommended by the directors in the annual report, it was brought before the general meeting, it was put before them fairly, and it was passed by that meeting. No doubt the mere fact that this was all done in good faith is not conclusive on the point. A thing may be done in good faith, and yet may be outside the powers of the company. But I think it material to bear this in mind, that unless what was being done was really done in the view of the parties for the benefit of the company, no reason is suggested why such a step should have been taken.

(1) 11 Ch. D. 449; 5 App. Cas. 473.
(2) 45 L. J. (Ch.) 437.
(3) 23 Ch. D. 654.
(4) 35 Ch. D. 675.

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Then, in my opinion, if this is within the powers of the company, it was been done in the reasonable performance of what is incident to the business of the company. It is notorious that pensions are constantly given to officers of trading companies as a recognition of the services they have rendered the company during the time in which they have been in its active service; but this matter stands in a somewhat different position from a pension; because it is a grant not to an officer of the company for the rest of his life, or for a limited period, but it is for the benefit of the family of the person after he himself has died. Now, as regards that, there is certain evidence which seems to me not to be immaterial. [His Lordship then referred to affidavits by the chairman of the *Bank of New South Wales* and the manager of the *London and Westminster Bank*, giving instances in which their banks had made precisely similar grants, and stating that such a practice was for the interest of the bank adopting it, and continued:—] There are other affidavits to a similar effect. I have selected these two particularly, because they both relate to the case of a person for whose family the grant was proposed after the decease of the individual.

Then to apply it to the present case. I have the affidavit of the chairman at the general meeting to which I have referred, one of the directors of the bank. He says: "It is, I believe, not at all unusual for banks to grant gratuities to the widows and families of their officers that die in their service, and if the *Bank of Australasia* were to be behind in this matter this would, in my judgment, tend to weaken the efficiency of the staff, and would therefore be injurious to the shareholders' interests. The said gratuity to the family of the said *Edmund Samuel Parkes* was granted and, as I believe, rightly granted as a matter of justice and custom, and with the view of increasing the prosperity of the bank, as it is only by dealing liberally with distinguished officers that the best men are attracted into the service of the bank."

A remark was made with respect to these affidavits that one knows nothing of the constitution of the associations referred to, and it may be that what was done in those cases was expressly authorized by their articles. I do not think that material, and for this reason. In considering what is the ordinary mode

of carrying on the business of a company one must look to what is done by other companies of a similar character and position engaged in the same pursuits. As far as the present company is concerned the disadvantage to the company of their abstaining from taking such a step as this would be just the same whether other companies who have made such grants to their officers and their families were or were not authorized to do it by the articles of those companies. It shews what is the course adopted in companies of this character, and that is why it seems to me very material to look to what other companies do independently of the question whether it is within their powers or not. Indeed, I am not sure that if what was done was done without express power it might not strengthen the case.

That being so, the question is whether what they have done is done here in the course of carrying on the business which is entrusted to them in the best way for the benefit of the shareholders, and whether it is within the scope of their business to do it. I think if I refer to two articles only, that will be sufficient for this purpose. Those are the 25th and 83rd. The 83rd refers to the powers of directors. [His Lordship stated the effect of the 83rd article and proceeded:—] Upon that article the directors have not taken upon themselves to act independently. Instead of passing the resolution themselves they have chosen to refer the matter to the general meeting, and the 25th article provides with respect to general meetings, "That in addition to the powers hereinbefore given, the general meetings shall (subject and without prejudice to the previously existing rules and regulations of the society or copartnership), have full power to superintend, regulate, and control all the affairs and concerns of the society or copartnership, and except where any particular general meeting or meetings is or are hereby required for the purpose any business, matter, or thing relating to the society or copartnership may be transacted or agitated at any general meeting." The exceptions refer to circumstances where it is essential that particular things, such as altering the rules of the company or providing for dissolution, should be brought before extraordinary meetings specially summoned for that particular purpose. It seems to me here that what has been done has been done for

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the purpose of giving effect to the objects of the company, and promoting the prosperity of the company. The evidence to which I have referred shews that the company has adopted a course similar to that adopted on similar occasions by similar companies carrying on similar business, one of them indeed being a company carrying on business in *Australia*, where the present company has its chief sphere of operations. The point is not without authority. There were three or four cases cited which I should refer to briefly. The first is the well-known case of *Taunton* v. *Royal Insurance Company* (1), where a vessel laden with gunpowder in the *Mersey* was blown up by accident. The *Royal Insurance Company* proposed to pay the losses sustained by persons insuring with them. A loss by explosion in particular cases was within the terms of the policy, but a loss by explosion such as that which had occurred was clearly not within those terms, and the question was whether what the directors proposed to do in paying losses that could not have been legally recovered against them by policy-holders was a matter which was within their power. As I pointed out there was no article expressly authorizing it; but it was held by Lord *Hatherley*, when Vice-Chancellor, that what they were doing was within their powers in carrying on the ordinary business of the company. He said (2): "The Court is always extremely careful to prevent the application of the funds of a company to any except the legitimate objects of the association. On the other hand, it is not for the interest of the companies themselves that the conduct of their business should be needlessly hampered, or that directors should be prevented from carrying it on in the manner most conducive to the well-being of the company. This is not a case of applying funds to purposes wholly foreign to the objects of the company, but it is an expenditure designed to secure to the company the largest possible amount of profits in its own proper business. It may be nevertheless that it exceeds the powers of the directors; and this is the question which I have to determine." Then he states what the point was, and adds: "The first question is, whether the general body of shareholders could not sanction such an act." I should say, there the directors proposed

(1) 2 H. & M. 135. (2) 2 H. & M. 138.

to act without a general meeting being consulted. He says: "If they could, a single shareholder cannot object, his only remedy being by the action of a general meeting"—then he says: "I do not suppose for a moment that what other companies have done would lead any Court of Law to conclude that this payment could have been enforced under a policy so framed as that before me. If the terms of the policy excluded a risk, such a custom will not bring it within the policy. But it is not unimportant to see how public companies find it advantageous to carry on their business. It is said that the payment is a mere gratuity. Let it be so called, it does not follow that it is beyond the power of the company if to give such gratuities be the generally received method of conducting such a business. Even the case put of subscribing to a school would, in my opinion, be a legitimate application of money if it were proved to be the received mode of carrying on a particular business." Then a little further on he says: "If therefore the power vested in the directors of promoting the general welfare of the company had been given to a general meeting of shareholders, and they had determined to make these payments as a good mode of securing custom, it would have been impossible for this Court to say that such an application of the funds was beyond the scope of the company's power. It is one thing to say that the directors are paying something which they are not bound to pay, and quite another thing to say that they are making payments for purposes not within the objects of the company. In this case the answer of the directors is, that they make the payments as the course most conducive to the objects and the interests of the company." Then, after referring to *Simpson* v. *Westminster Hotel Company* (1), he says: "Applying this principle to the present case, I think very few persons would be found to dispute, on the evidence before me, that the payments objected to are conducive to the welfare of the society, and a legitimate mode of promoting the objects of the concern."

Now, applying that to the case before me, the evidence shewing that it would be for the general benefit of the company has not been met by any affidavit of any person whatever. No witness comes forward to say, even in his opinion, that this is not con-

(1) 8 H. L. C. 712, 717.

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ducive to the prosperity of the company, and not in accordance with the course adopted by similar companies in like cases.

In *Attorney-General* v. *Great Eastern Railway Company* the Lord Justice *James* makes this important remark (1): "It appears to me that, whether as regards a private partnership, a joint stock company, or an incorporated company, in the absence of fraud or deliberate perversion,"—which I understand to mean deliberately going outside the admitted object of the company—"the majority of managing partners may be trusted, and ought to be trusted, in determining for themselves what they may do, and to what extent they may go in matters indirectly connected with, or arising out of, their business relations with others." Now, if the majority of managing partners may be trusted *à fortiori* the majority of shareholders present at the general meeting may be trusted to do the same thing.

In the case of *Hampson* v. *Price's Patent Candle Company* (2) Sir *George Jessel* held that the application of part of the profits of the company in paying a gratuity to each person employed in the factory was a reasonable exercise of the powers of management which the company had, there being no special words in that case giving any greater authority for what was done than there are in the present.

Then there is only one other case I need refer to, the case of *Hutton* v. *West Cork Railway Company* (3), in the Court of Appeal. There a company was in the course of winding up. It had sold its undertaking to another company, and they were distributing the assets upon that winding-up, and they proposed to do several things, two of which were these—to provide a certain sum for the officials of the company, and another sum towards the remuneration of the directors. In that case what was done was held not to be authorized, but for this reason, which makes it entirely distinct from the present case, that there the company had ceased to be a going concern, it had been wound up, its business had been sold to another company, and making gratuities to the persons who had been employed by it could not be an act tending to the prosperity of the company. But I think it clear, from

(1) 11 Ch. D. 480. (2) 45 L. J. (Ch.) 437.
(3) 23 Ch. D. 654.

the observations of the Lords Justices who decided the case, that if it had been the case of a going company they would all have been of opinion that what was done could properly be done. Lord Justice *Cotton* referred to the cases which I have mentioned, *Taunton* v. *Royal Insurance Company* (1) and *Hampson* v. *Price's Patent Candle Company* (2), and said (3): "In my opinion those cases went on a principle which is not applicable to the existing state of this company, from the time when it handed over its railway to another company, and existed only for the purpose of winding up the concern. The principle of those cases, as I understand, is this, that where there are directors of a trading company, those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business, with a view to getting either better work from their servants, or with a view to attract customers to them, as in the case of an insurance company." In that case it was to attract customers. In the present case the reason suggested is that it secures a better class of officials who are willing to take service with the company, an object of equal importance of course for carrying on its legitimate business. Then there are some observations by Lord Justice *Bowen* that are very important. I do not intend to go through them because they run over something like three or four pages, but they are very important indeed as bearing upon this subject. He says in the course of those remarks (4), "Now can a majority compel a dissentient unit in the company to give way and to submit to these payments? We must go back to the root of things. The money which is going to be spent is not the money of the majority. That is clear. It is the money of the company, and the majority want to spend it. What would be the natural limit of their power to do so? They can only spend money which is not theirs but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company. That is the general doctrine. *Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a

(1) 2 H. & M. 135.
(2) 45 L. J. (Ch.) 437.
(3) 23 Ch. D. 665.
(4) Ibid. 671.

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manner perfectly *bonâ fide* yet perfectly irrational. The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company," and then a little further on he says this: "That does not get rid of the difficulty, because one must still ask oneself what is the general law about gratuitous payments which are made by the directors or by a company so as to bind dissentients. It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors who have got all the powers of the company given to them by sect. 90 of the *Companies Clauses Consolidation Act*, are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance. A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company, and a company which always treated its *employés* with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted —at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."

Now those two last cases are cases of directors, which I do not think is so strong as the case of a general meeting; and looking at the law as laid down in those cases, it seems to me that what has been done by the present company comes strictly within the law there laid down.

I do not fail to notice that the sums which were the subject of discussion in the two last cases were considerably less than the sum which is the subject of the present application, but that is a matter with which I conceive I have nothing to do. It is not for a Judge to express any opinion upon such matters as whether the amount is too large or too small. In the first place he has no means of forming any opinion about that: the directors of the company know a great deal more about those matters than he can possibly do: and in the next place the persons who have power to bind the dissentients are the other members of the company, and they are the persons who have passed the resolution in the present case.

Then it is said that this was a case in which the company are pledging their future earnings. That no doubt is a thing which they have to take into consideration when the scheme is before them to which they propose to give effect, and no doubt it has been considered here, but that is not a reason why what otherwise would be legal is not legal. The fact that they are pledging future earnings in a certain sense exists in every case where a pension is given to a retiring servant.

Then another thing said was that Mr. *Henderson* appears from the evidence at a recent date to have consulted a good many of the shareholders, and to have got an expression of opinion from a good many of them that they do not approve of what has been done. I have nothing to do with that. If they do not approve of it they have a course open to them, but that course is not by applying to a Court of Law to assist them in the matter.

Under these circumstances I come to the conclusion that the application of the Plaintiff to restrain the directors from carrying out what has been resolved by the general meeting is one which I cannot accede to; and as the parties have agreed that this should be treated as the trial of the action, the order that I make is that the action be dismissed with costs.

An appeal was presented, but subsequently withdrawn.

Solicitors for Plaintiff: *Dawes & Son.*
Solicitors for Defendants: *Farrer & Co.*

D. P.

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Nov. 5, 6.

FARRAND *v.* YORKSHIRE BANKING COMPANY.

[1887 F. 455.]

Mortgage—Priority—Negligence—Omission to obtain Title Deeds—Postponement of first Equitable Mortgagee to second.

In order to postpone an equitable mortgagee to another equitable mortgagee whose security is of later date, it is not necessary, as it would be in order to deprive a legal mortgagee of the advantage of the legal estate, to shew that the first mortgagee has been guilty of negligence amounting to, or which is evidence of, fraud. Negligence, such as omission to obtain possession of or to make inquiries about the title-deeds, may be sufficient.

Northern Counties of England Fire Insurance Company v. *Whipp* (1) distinguished.

ACTION to determine the priorities of two equitable mortgagees.

The Plaintiffs were the executors of the will of *Thomas Turner*, who died on the 28th of May, 1868, and also devisees of his trust and mortgage estates. In July, 1860, *Turner* lent to the Defendant *William Prince*, a sum of £200 to enable him to make up the purchase-money of some copyhold property, situate at *Chapel Haddlesey*, in *Yorkshire*, which he had agreed to purchase. The repayment of this sum was secured by a bond given by *Prince* to *Turner* on the 16th of July, 1860. On the same day an agreement in writing was entered into between *Prince* and *Turner* (to which *Frances Prince*, the wife of *Prince*, also a Defendant, was made an assenting party by indorsement) by which, in consideration of the £200 lent by *Turner* to *Prince*, *Prince*, with the assent of his wife, agreed with *Turner*, that he (*Prince*) would, as and so soon as he should be admitted tenant on the Court rolls in respect of the copyhold property, execute and pass a proper mortgage surrender of the said property in favour of *Turner*, his heirs, executors, or administrators, if the said sum should be then unpaid, and as a collateral security with the bond; that *Prince* would also procure the concurrence of all necessary parties in the mortgage surrender; and that *Prince* would also, on receipt of the title-deeds and writings relating to

(1) 26 Ch. D. 482.

the property, hand them to the solicitor of *Turner*, his heirs, executors, or administrators for the purpose of preparing the mortgage surrender.

The purchase was afterwards completed, and on the 16th of August, 1860, *Prince* and his wife were admitted on the Court rolls as tenants in fee simple of the property, and the title-deeds were delivered to him. He did not, however, carry out his agreement to hand over the deeds to *Turner*, but on the 23rd of August, 1861, *Prince* and his wife deposited the deeds with the Defendants the *Yorkshire Banking Company*, and on the same day gave to the company a memorandum of deposit by way of equitable mortgage to secure £350, the then overdrawn balance of *Prince's* current account with the company, and further advances. And *Prince* and his wife thereby undertook that they would, when requested by the bank so to do, execute to the bank, or their nominee, a legal mortgage of the property, to secure the principal money and interest intended to be thereby secured. The bank when this deposit was made had no notice of the prior charge to *Turner*. On the faith of this security the bank continued the current account with *Prince* until December, 1883, when there was a balance of £335 due from him. The half-yearly balances due from him to the bank during this period had always been less than £350, the amount of the original debt, though at times during the half-years the balance due from him had exceeded £350. In December, 1883, the bank demanded payment of the £335 from *Prince*. He was unable to pay it, and on the 16th of January, 1884, he and his wife surrendered the property to the use of Mr. *Walker*, the general manager of the bank, in fee, on behalf of the bank, by way of legal mortgage to secure the debt, and on the same day *Walker* was admitted tenant of the property accordingly. On the 1st of February, 1884, the Plaintiffs gave notice to the bank of *Turner's* charge. *Turner* during his life had never made any inquiry about the title-deeds, nor had the Plaintiffs previously to 1884 made any inquiry. The bank alleged that they had no notice of the Plaintiffs' mortgage until after the legal estate in the property had been acquired by them. The interest on the £200 had been duly paid by *Prince* down to October, 1882.

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The bank claimed priority over the Plaintiffs, and the Plaintiffs brought this action, claiming a declaration establishing the validity of their charge; a declaration that it was entitled to priority over the equitable charge of the bank; and consequential relief.

This was the trial of the action.

Crackanthorpe, Q.C., and *A. Brown*, for the Plaintiffs:—

The Plaintiffs' mortgage is prior in date to that of the bank, and they have a better equity than the bank, and are entitled to priority over them. It was impossible for the Plaintiffs' testator to obtain possession of the title-deeds at the time when he advanced his money, because the mortgagor had not then got them, and the money was advanced to him to enable him to complete the purchase of the property. No time was mentioned for the completion of the purchase, and the testator did not know when it was to be completed, or when in fact it was completed. The absence of the deeds is fully accounted for. The testator was entitled to rely on the promise of *Prince* to hand over the deeds when he should get them, and was not bound to suppose that he would commit a fraud. The mere fact that the bank (assuming them to be only equitable mortgagees) have obtained the deeds is not sufficient to give them priority. The Plaintiffs and their testator were not guilty of any such negligence as can deprive them of the priority to which they are entitled by reason of the priority in date of their mortgage: *Shropshire Union Railways and Canal Company* v. *The Queen* (1); *Thorpe* v. *Holdsworth* (2); *Hewitt* v. *Loosemore* (3). The Plaintiffs did not in any way enable the mortgagor to commit a fraud. It has been held that a mortgagee who has got in the legal estate cannot be deprived of it in favour of an equitable mortgagee, unless he has been guilty of fraud, or of negligence so gross as to be evidence of fraud: *Northern Counties of England Fire Insurance Company* v. *Whipp* (4).

[NORTH, J., referred to *Manners* v. *Mew* (5).]

(1) Law Rep. 7 H. L. 496, 506.
(2) Ibid. 7 Eq. 139, 146.
(3) 9 Hare, 449, 456.
(4) 26 Ch. D. 482, 490, 491.
(5) 29 Ch. D. 725.

The same principle applies as between two equitable mortgagees.

The bank stand in no better position by reason of their having got in the legal estate in the property. The mortgagor had made himself a trustee for the testator, and the bank got in the legal estate without giving any fresh consideration to the mortgagor for it: *Maxfield* v. *Burton* (1); *Mumford* v. *Stohwasser* (2); *Garnham* v. *Skipper* (3). *Manners* v. *Mew* (4) has not much bearing on the present case.

The onus is on the Defendants to shew at what date *Prince* obtained possession of the title-deeds.

[They also referred to *Union Bank of London* v. *Kent* (5).]

Cozens-Hardy, Q.C., and *Wiglesworth*, for the Banking Company:—

The bank are entitled to priority over the Plaintiffs; (1) By virtue of their obtaining possession of the title-deeds without notice of the Plaintiffs' claim; (2) By reason of their obtaining a surrender of the legal estate without notice of the Plaintiffs' claim, and advancing money to *Prince* by continuing his current account.

(1) As between two equitable mortgagees the possession of the title-deeds will *primâ facie* give priority. As regards the negligence of the testator as to obtaining possession of the deeds, time ran against him as from the date of the agreement of July, 1860. He never made any inquiry about the deeds, but allowed them to remain in the possession of *Prince*, and thus enabled him to commit a fraud. The bank went on for twenty-three years advancing money to *Prince*, on the faith of the security which they had obtained without any notice of the Plaintiffs' claim. The fraud of *Prince* was rendered possible by the gross negligence of the testator and the Plaintiffs. No doubt, as between equitable mortgagees, priority of date will, in the absence of other circumstances, give priority of right, but very slight circumstances (*e.g.*, the possession of the deeds will turn the scale):

(1) Law Rep. 17 Eq. 15.
(2) Ibid. 18 Eq. 556.
(3) 34 W. R. 135.
(4) 29 Ch. D. 725.
(5) 39 Ch. D. 238.

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Rice v. *Rice* (1); *Layard* v. *Maud* (2). In order to deprive an equitable mortgagee of the priority due to the earlier date of his mortgage, it is sufficient to prove negligence; it is not necessary to prove negligence amounting to fraud: *Lloyd's Banking Company* v. *Jones* (3). In *Northern Counties of England Fire Insurance Company* v. *Whipp* (4) Lord Justice *Fry* was speaking of a legal mortgagee. The same doctrine does not apply as between equitable mortgagees.

(2) The bank acquired the legal estate without notice of the Plaintiffs' claim. The Plaintiffs do not allege that we had notice, and we are not bound to prove that we had not.

[NORTH, J.:—It is for you to prove that you were purchasers for value without notice.]

Garnham v. *Skipper* (5) is exactly in point. *Maxfield* v. *Burton* (6) does not affect our argument, nor does *Mumford* v. *Stohwasser* (7).

Crackanthorpe, in reply:—

[NORTH, J.:—I am disposed to give the manager of the bank an opportunity of making an affidavit that the bank had no notice of the Plaintiffs' claim before they acquired the legal estate. I will deal with the case on the assumption that that affidavit has been made.]

National Provincial Bank of England v. *Jackson* (8) does not shew that there is any difference between a legal mortgagee and an equitable mortgagee as to the amount of negligence which must be proved in order to deprive him of his priority. In both cases the question is one of conduct. We had a right to assume that *Prince* would not commit a fraud.

Union Bank of London v. *Kent* (9) is in point.

The bank gave no fresh consideration when they acquired the legal estate; the balance due on *Prince's* current account was not increased after that date. The surrender of the legal estate

(1) 2 Drew. 73.
(2) Law Rep. 4 Eq. 397.
(3) 29 Ch. D. 221.
(4) 26 Ch. D. 491.
(5) 34 W. R. 135.
(6) Law Rep. 17 Eq. 15.
(7) Ibid. 18 Eq. 556.
(8) 33 Ch. D. 1.
(9) 39 Ch. D. 238.

to the bank was a voluntary act on the part of *Prince*. *Garnham* v. *Skipper* (1) is not an authority to the contrary.

NORTH, J.:—

I am prepared to decide this case in favour of the bank upon the first ground which has been argued. If I had to decide it on the second ground, I should require some further evidence than I have yet got. I do not know enough of the circumstances under which the conveyance of the legal estate was made to the bank to enable me to decide the case satisfactorily upon that point. But, on the first ground, I am of opinion that the bank are entitled to priority. The Plaintiffs' testator obtained his mortgage by an agreement to deposit deeds made in 1860. A year afterwards an agreement to deposit the deeds was made by the mortgagor with the bank, and not only so, but the deeds were actually deposited with them. For this year, during which the testator was entitled to hold the deeds, he never had them and never asked for them at all. It is quite true that the deeds could not be handed over to him at the time when he advanced the money, because the advance was made for the purpose of contributing to the purchase-money of the estate which was going to be bought by the mortgagor, and, of course, until after the purchase-money had been paid, the deeds could not be handed over to him by the mortgagor. But there is no reason to suppose that the money was advanced very long before it was actually required by the mortgagor for the purpose of his paying it to the vendor of the estate, and I have no doubt that that payment took place, or that the deeds were received by the mortgagor, very shortly after the date at which the money was advanced by the testator to *Prince*. Then for a year afterwards nothing whatever was done by the testator; the bank took their security, and kept it for some twenty-two years, going on dealing with *Prince* upon the footing of it, making various advances to him. Probably Mr. *Crackanthorpe* is right in saying that at the dates on which the half-yearly balances were struck they were less than the amount of the original advance, but a casual reference to the pass-book shews that there were some dates at which

(1) 34 W. R. 135.

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the balance was higher. But it does not appear to me that that is very material. The account was continued in the usual way in which such accounts are kept, and in which this account was intended to be kept when the security was given. At the end of the twenty-two years the bank called upon *Prince* for payment of what he owed them. They were no longer satisfied with the security which they had. It appears from the 6th paragraph of the statement of defence (which is practically admitted for this purpose) that he was unable to pay, and that at their request he executed a surrender to them of the mortgaged property. It was not until after that surrender had been made, when, I suppose, there was something in *Prince's* position which attracted the attention of his other creditors, that the Plaintiffs gave notice of their mortgage to the bank.

The question is, under these circumstances, which of the two, the Plaintiffs or the bank, ought to be preferred? It is said that they have what are called "equal equities." Of course, one equity is always prior to the other in date, and the expression "equal equities" does not refer to equality in date. When equities are equal in other respects the earlier in date is preferred, but, when equities are not equal, then the priority of date is easily got over, at any rate, as between equitable incumbrancers. Now, if the Plaintiffs' testator had asked for the deeds, which under his agreement he was entitled to have, the bank could not have been defrauded by *Prince* by his depositing the deeds with them, for it is clear that *Prince* obtained advances from the bank without communicating to them the fact that there was another security on the property. The way in which they were originally induced to lend their money to *Prince* and to continue dealing with him for twenty years and more, arose simply and solely from the fact that the Plaintiffs' testator first, and the Plaintiffs after his death, had not chosen to ask for the deeds, or to make any inquiry about them. The testator allowed *Prince* to receive the deeds on the completion of his purchase, and the testator and the Plaintiffs allowed him to retain them for his own purposes, so that he had power to deal with them as he pleased without any claim on their part. It seems to me that in this state of things the equities are not equal, and the Plaintiffs are

not entitled to set up against the Defendants that they are prior to them in point of date. In support of this view I may refer to what Mr. Justice *Pearson* said in *Lloyd's Banking Company* v. *Jones* (1): "The doctrine of this Court has always been, that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them." When he says, "Where there are equities which are otherwise equal" he is not referring to the dates being the same. In that case there was a difference in date, but he says that where the equities, otherwise than as regards priority of date, are equal, the possession of the deeds gives priority to the person who has got them. Mr. *Crackanthorpe* relied on some observations in the judgment of the Court of Appeal, delivered by Lord Justice *Fry*, in *Northern Counties of England Fire Insurance Company* v. *Whipp* (2), to the effect that nothing but fraud, or negligence which the Court considers to be evidence of fraud, is sufficient to postpone a legal mortgagee to an equitable mortgagor, and argued that *pari ratione* the same doctrine must apply as between two equitable mortgagees. The distinction, however, between the two cases is clear, and it cannot be better stated than in the judgment of Lord Justice *Cotton* in *National Provincial Bank of England* v. *Jackson* (3), where, after referring to Lord Justice *Fry's* judgment in *Northern Counties of England Fire Insurance Company* v. *Whipp* as recognising the difference between the case of a contest between equities and one between an equitable title and the legal estate, he quoted this passage (4): "The question is, not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate," and he added, "And the judgment in *Kettlewell* v. *Watson* (5) is to the same effect. As between equitable claims the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other." In the present case it was by reason of the omission of the Plaintiffs' testator to obtain the deeds that *Prince* was enabled to

(1) 29 Ch. D. 229.
(2) 26 Ch. D. 482.
(3) 33 Ch. D. 1.
(4) Ibid. 13.
(5) 21 Ch. D. 685.

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procure money from the bank by depositing the deeds with them. The case seems to me in principle very like *Rice* v. *Rice* (1), though the facts are different. In that case the party who was postponed had signed a receipt for purchase-money when he had not got the money, and it was held that by signing that receipt he had induced the parties who saw the deed to believe that the receipt was true, and that the money had been paid. In the present case the Plaintiffs, who claim the first charge, allowed the mortgagor to deal with the deeds as if they were his own, and, therefore, so far as he dealt with them in favour of the bank, the Plaintiffs must be postponed to the bank.

Solicitors for the Plaintiffs: *Emmet, Son, & Stubbs,* agents for *G. H. Spink, Pontefract.*

Solicitors for the Bank: *Ridsdale & Son,* agents for *Weddall, Parker, & Parker, Selby.*

W. L. C.

NORTH, J. 1888 *Nov.* 16, 26.

In re GENT. GENT-DAVIS *v.* HARRIS.

[1880 G. 920]

Member of Parliament—Privilege from Arrest—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 3 [*Revised Ed. Statutes, vol. xvi., p.* 112]—*Receiver—Debtors Act* (1869) *Amendment Act,* 1878 (41 & 42 *Vict. c.* 54) [*Revised Ed. Statutes, vol. xviii., p.* 883]—*Discretion of Court—Poverty.*

A person who owes money come to his hands as receiver is in a fiduciary capacity within the meaning of the third exception to sect. 4 of the *Debtors Act,* 1869.

He is liable to attachment for breach of an order to pay such sums made after he has been discharged from being receiver.

Attachment for breach of such order, being of a punitive character, is not subject to privilege of Parliament.

The mere fact that a defaulting receiver is unable to pay is not sufficient to induce the Court to exercise the discretion given by the *Debtors Act* (1869) *Amendment Act,* 1878, and to refuse leave to issue a writ of attachment against him.

THIS was an action for administration of the estate of a testator, *John Henry Gent,* a distiller's merchant.

By judgment dated the 5th of August, 1880, *Robert Gent-Davis,*

(1) 2 Drew. 73.

the Plaintiff in the action and a beneficiary legatee in trust of the testator's business, was appointed receiver and manager of the testator's business. By a certificate of the Chief Clerk, dated the 5th of May, 1888, it was found upon the balance of the 6th, 7th and 8th accounts carried in by the Plaintiff there was due from him the sum of £7678 4*s.* 6*d.* By an order dated the 1st of June, 1888, the Plaintiff was discharged from his office of receiver and manager, and ordered forthwith to pass his final account and pay the balance that should be found due from him into Court. On the 12th of July, 1888, an order was made, without prejudice to the question whether he was entitled to retain a sum of £2559 8*s.* 2*d.* claimed by him in respect of his own share, and a sum of £510 10*s.* 6*d.* for his remuneration, and without prejudice to the question whether he was liable to pay interest on the balance certified to be due from him, that he should, on or before the 30th of July, 1888, pay into Court £3778 19*s.* 2*d.*, being the residue of the £7678 4*s.* 6*d.* after deducting the sums claimed by him in respect of his own share and remuneration, and also a sum of £829 6*s.* 8*d.* advanced by him to *Ellen Gent*, a beneficiary.

He had not passed his final account, and had not paid any of the £3778 19*s.* 2*d.* into Court. On the 8th of September, 1888, notice of motion was served on the Plaintiff on behalf of *Ellen Gent* before the Vacation Judge for Wednesday, the 12th of September, 1888, for leave to issue a writ of attachment against the Plaintiff for non-compliance with the order of the 12th of July. The notice was also served on *John Harris* the younger, a Defendant.

On the 12th of September, 1888, the matter was mentioned to the Vacation Judge, and the motion stood over till Michaelmas Sittings on terms signed by the solicitors for all parties: "Plaintiff to pay £1500 into Court at once on account," and to pay certain specified costs.

The £1500 was duly paid into Court, no costs had been paid by the Plaintiff, and no further sum had been paid in by him, and he had not passed his final account.

He had made an affidavit, filed on the 15th of November, in the following terms:—

"1. The sum of £1500, part of the sum of £3778 19*s.* 2*d.*, which

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I was ordered to pay into Court by the order dated the 19th of July, 1888, was paid into Court on the 12th of September last. I have done my best to find the balance of the money so ordered to be paid in, but up to the present time have been unable to do so. If a writ of attachment is issued against me I shall be totally unable to find such balance.

"2. I am member of parliament for the Kennington Division of the borough of Lambeth, and as such I must claim my privilege."

A. Rowden, for the motion :—

The Respondent, Mr. *Gent-Davis,* as receiver and manager under order of the Court, is in a fiduciary position as well as being trustee under the will, he is therefore within the third exception to the 4th section of the *Debtors Act,* 1869 ; *In re Bell's Estate* (1) ; *Marris* v. *Ingram* (2).

It is only when the motion is brought on after adjournment that privilege of Parliament is set up. By entering into terms when the motion ought to have been heard he has waived his privilege if he had any.

The application is of a punitive character in respect of an offence of a criminal nature : *Marris* v. *Ingram ; In re Dudley* (3).

Privilege therefore, whether privilege of Parliament or other privilege, does not apply : *Long Wellesley's Case* (4) ; *In re Freston* (5).

The offence is of such a heinous nature that the Court will not exercise the discretion given by the *Debtors Act Amendment Act,* 1878, enabling the Court not to put in force its power of arrest : *Marris* v. *Ingram ; Holroyde* v. *Garnett* (6) ; *In re Freston.*

Jason Smith, for *John Harris,* the younger.

McSwinney, for Mr. *Gent-Davis* :—

The mere fact that an arrangement was made for the motion to stand over, cannot affect the right to set up privilege of Parliament, or any other objection. A member of parliament

(1) Law Rep. 9 Eq. 172.
(2) 13 Ch. D. 338.
(3) 12 Q. B. D. 44.
(4) 2 Russ. & My. 639.
(5) 11 Q. B. D. 545.
(6) 20 Ch. D. 532.

has no right to waive his privilege: for it is not his privilege as an individual.

The evidence shews that the Plaintiff has, not through his fault so much as through his misfortune, made default. In the first place, he has been guilty of no such criminal conduct that the privilege can be disregarded; in the second place, this is a case in which the Court will exercise the discretion given to it by the *Amendment Act*, 1878, and not send this man to prison when doing so would do no one any good: *Barrett* v. *Hammond* (1); *Holroyde* v. *Garnett* (2). But the Plaintiff did not receive the money in a fiduciary character at all, he was not acting as a trustee but as the servant of the Court.

Further, he had been discharged from being receiver when the order for payment in was made. At that time, at any rate, he had ceased to occupy a fiduciary position.

[NORTH, J.:—The question is, what was the position in respect of which he obtained the money. A man cannot get rid of his liability for acts done in a particular capacity by ceasing to fill that capacity: *In re Strong* (3).]

A. Rowden, in reply.

NORTH, J. (after stating the facts, continued):—

In the first place, it was said on the part of the Plaintiff that sect. 4 of the *Debtors Act*, 1869, was an answer to the application: that provides "with the exceptions hereinafter contained, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money." The third exemption is "default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control."

Exemption 4 relates to solicitors acting in the capacity of officers of the Court. It is said that though an officer of the Court he is not a solicitor, and not therefore within the 4th exemption, and that he did not fill a fiduciary character, and was not within the 3rd exemption. In my opinion a receiver of the

(1) 10 Ch. D. 285. (2) 20 Ch. D. 532.
(3) 32 Ch. D. 342.

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Court is clearly in a fiduciary position. I should have thought so without any authority. But there are authorities that apply. In the case of *In re Bell's Estate* (1) a receiver was held to be in a fiduciary capacity. In *Marris* v. *Ingram* (2) it was held that any one who had received moneys for others was in a fiduciary capacity. *Crowther* v. *Elgood* (3) was an authority to the same effect in the case of an auctioneer, and *Litchfield* v. *Jones* (4) was a case of an agent; the defaulting party was there a solicitor in fact, but it was in his capacity of agent and not solicitor that he was brought before the Court.

Then it is said that when the order for payment into Court was made, Mr. *Gent-Davis* was not a receiver, and was not at any rate then acting in a fiduciary capacity. In my opinion that is no answer to the motion. It is clear that he was in a fiduciary capacity when his account was passed on which it was found that there was a balance due from him. In my opinion he did not cease to be in a fiduciary capacity by ceasing to be a receiver. But if there were any doubt, the case of *In re Strong* (5) shews that if a man is once in a fiduciary position in respect of which he is acting the fact that he has ceased to act will not relieve him from liabilities he has incurred while acting in that capacity. I think that the effect of the order of the 12th of July is not quite apprehended in argument. It is quite true that the order is that the receiver "be and is hereby" discharged, but the order directs an account against him as receiver. The order does not purport to relieve him from any liability incurred in that capacity. The real meaning of the discharge is simply to prevent him receiving more, or any longer acting as manager.

Then it is said further that the Respondent has no means, and an affidavit of his is put in. [His Lordship read the first paragraph of the Plaintiff's affidavit.] Now, in the first place, in that affidavit there is no statement except that he has no money: that is not sufficient in itself. There is no statement or explanation of what has become of these large sums of money he has received. Now it is clear that the jurisdiction conferred by the

(1) Law Rep. 9 Eq. 172.
(2) 13 Ch. D. 338.
(3) 34 Ch. D. 691.
(4) 36 Ch. D. 530.
(5) 32 Ch. D. 342.

Act is one which authorizes and requires the punishment of persons who come within the exception.

In the case of *Marris* v. *Ingram* (1) the late Master of the Rolls, after reading the third exception, said: "Why is such a person as the last excepted? Simply because he is a dishonest man. He need not perhaps be called a thief in so many words, but he is a man who takes or keeps money belonging to other people, and he is to be punished as such." A little further on he said: "Therefore the Act abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, and intended to be so." Then the Act of 1878 was passed, which gave the Court a discretion which it had not before. Upon that Vice-Chancellor *Bacon* said, in the case of *Holroyde* v. *Garnett* (2): "The Act of 1878, under which a very anxious and delicate discretion is to be exercised by the Court, clearly had for its object that the Court should take into consideration the circumstances of each case, and the jurisdiction is only vindictive so far as it may be exercised to punish fraudulent misapplications, in which case the power of imprisonment would be exercised without hesitation." Then there was another case, which came before Mr. Justice *Kay*, *In re Knowles* (3). It was a case of a trustee within the third exception to sect. 4. Speaking of cases of trustees that came within this exception, he said (4): "He may improperly invest moneys—that is a comparatively lenient offence; but to put them into his own pocket and mix them with his own moneys, whereby they are lost, is one of the most improper acts a trustee can possibly commit . . . . The question I have to consider is, whether or not in this case the penalty should be enforced against him by issuing a writ of attachment, and the defence is that he says he has not means of payment." It is not necessary to refer to the particulars of that case. After commenting on them, Mr. Justice *Kay* proceeded: "But if it were clear that he had not the means to pay, the present case does not seem to me to be one in which the Court ought not to make the order. If the exception in this Act was

(1) 13 Ch. D. 342.
(2) 20 Ch. D. 534.
(3) 52 L. J. (Ch.) 685.
(4) Ibid. 686.

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intended for the punishment of trustees who do such things as these, the present is clearly a case in which the attachment ought to issue. Taking that view, which I am justified in doing by the case of *Marris* v. *Ingram* (1), I think that this is a case in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity, even though he is unable to pay, and for the purpose of teaching other trustees the same lesson—a very salutary one in many cases."

And in respect of the affidavit that the Plaintiff has no means, it seems to me no extenuation of such a fault to say that having received money for other people he has spent it all and has none of it left.

A further point raised is that the Respondent is a member of parliament, and entitled to privilege from arrest. And upon that a point was raised on the part of the person applying, that it was not now open to the Plaintiff to set that up, and that he has waived the objection, because when the matter was first before the Court the objection was not taken, and the motion stood over by arrangement. In my opinion, that is not material. If it had been a case in which there was no jurisdiction, there might have been something in this point; but the question on this part of the case is whether the jurisdiction which the Court clearly has ought or ought not to be exercised by reason of the existence of a privilege, and I think the effect of the arrangement was that the motion should stand over, the parties remaining in the same position. The Plaintiff is, therefore, in my opinion, entitled to set up the question of privilege.

Then the question is, whether there is such privilege. In my opinion the question of parliamentary privilege has no application whatever to a case like this. When the matter came before the Court in *Long Wellesley's Case* (2), Lord Chancellor *Brougham* said: "The line, then, which I draw is this;—that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not: that he who has privilege of parliament, in all civil matters, matters which whatever

(1) 13 Ch. D. 338.

(2) 2 Russ. & My. 665.

be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that members of parliament are privileged against commitment *quâ* process, to compel them to do an act;—against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance;—that in all such matters members of parliament are protected; but that they are no more protected than the rest of the King's subjects from commitment in execution of a sentence, where the sentence is that of a Court of competent jurisdiction, and has been duly and regularly pronounced." A little further on in the case he remarked (1): "There are cases indeed which go a good deal further, and which justify me in denying that what, in common parlance, may be called criminal contempt, must have been committed in order to oust the privilege. If the contempt savours of criminality, and the sentence is penal, that, according to the books, appears to be enough." The matter has been before the Court of Appeal recently in several cases. The first of these cases is that of *In re Freston* (2). The person moved against was a solicitor, being within the fourth exception in sect. 4 of the *Debtors Act*, 1869, and attachment was issued against him for non-payment of a sum of £10 and costs he had been ordered to pay, and, attachment having been issued, the solicitor was arrested on his way from a police-court, and the point was raised that, being on the way from the discharge of his professional duties, he was privileged from arrest. The present Master of the Rolls said this (3): "I think it very plain that the privilege did exist, provided the process upon which he was arrested was of a civil nature. It is clear that there is no privilege from arrest upon a criminal charge; but the privilege does apply as to arrest upon mesne process, and upon judgment for debts and other causes of action: it is clear that the privilege can be successfully claimed by members of parliament, by witnesses going to or coming from Courts of Justice in obedience to subpœnas, and by solicitors and

(1) 2 Russ. & My. 667. (2) 11 Q. B. D. 545.
(3) 11 Q. B. D. 552.

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barristers attending Courts to discharge their professional duties." A little further on in his judgment, after reading the passage in the judgment of Lord *Brougham* in *Long Wellesley's Case* (1), already referred to, the Master of the Rolls proceeded (2): "The words 'provided the commitment be not in the nature of punishment,' are very material in the present case, as pointing out the limit to be placed upon the privilege claimed. I do not feel bound by the language used by Lord *Brougham*, but I am bound by the principle enunciated. That principle is that process to enforce civil obligations is subject to privilege, but process for acts in the nature of offences is not. Attachments are granted for neglect of obedience to the orders of Courts of Justice; when they are issued merely for the purpose of enforcing judgments in civil disputes, and when the breach of the order to do or not to do something cannot be said to be in the nature of an offence, then the privilege can be claimed; but where an attachment is issued for a breach of the law, or as a remedy for something that is a breach of the law and in the nature of an offence, no privilege can be claimed. The question, therefore, is, whether if a solicitor disobeys an order made on him in his character as a solicitor, he commits an offence and becomes subject to criminal process, or whether he is merely subject to civil process." After dealing with the facts of that case, a little further on he says (3): "The *Debtors Acts*, 1869, 1878, were much commented upon in *Marris* v. *Ingram* (4): the late Master of the Rolls, my immediate predecessor, took a strong view as to the effect of the provisions of the earlier Act, which he pointed out was intended, at least partly, 'for the punishment of fraudulent debtors;' and he also stated the reasons of the Legislature for passing the later Act. He referred to the case of fraudulent trustees, who fall within the *Debtors Act*, 1869, sect. 4, sub-sect. 3: they ought to be punished as criminals, and the statute punished their misconduct as a criminal offence. He spoke also of defaulting solicitors, who fall within sub-sect. 4; and the words which he used shew that he had an equally strong opinion as to them. I do not altogether agree with the language of the late Master of the Rolls; but I

(1) 2 Russ. & My. 665.
(2) 11 Q. B. D. 553.
(3) 11 Q. B. D. 555.
(4) 13 Ch. D. 338.

entirely agree that the statutes go a very long way to shew that a default by a solicitor is an act of a criminal nature, for which he may be punished as for a contempt. The contempt of *W. A. Freston* was in the nature of an offence, and no privilege can be claimed on his behalf; for attachment is a mode of curing or punishing an offence." In the later case of *In re Dudley* (1), the matter came before the same Court, and the Master of the Rolls again said (2): "The jurisdiction of the High Court over a solicitor is of a peculiar nature. When there has been a default upon his part, the Court may make different kinds of orders; if an order is made against a solicitor merely for the payment of a sum of money, it may be that he is within the protection of the general clauses of the *Debtors Act*, 1869. But the Court has also a jurisdiction of another kind. If a solicitor has improperly dealt with or has misappropriated the money of his client, the Court can inquire into the facts; if a solicitor has simply through misfortune failed to pay over the money to his client, perhaps a punitive order will not be made against him; but if he has acted dishonestly, forthwith an order to attach him may be made. The object of this procedure was to secure honesty in the conduct of solicitors."

The case then before the Court was the case of a solicitor. In my opinion exactly the same observations apply to persons in a fiduciary capacity. There is a later case in which I took exactly the same view: *In re Wray* (3). I only refer to that because it went to the Court of Appeal, and my decision was upheld.

The case is one in which I must accede to the motion.

Solicitors for *Ellen Gent*: *Pownall & Co.*

Solicitors for the Defendant, *John Harris* the younger: *Roscoe & Hincks.*

Solicitors for Plaintiff: *Soames, Edwards, & Jones.*

(1) 12 Q. B. D. 44. (2) 12 Q. B. D. 47.
(3) 36 Ch. D. 138.

D. P.

STIRLING, J.

1888

May 8, 9; *June* 12.

In re SCANLAN, INFANTS.

Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27)—*Rights of surviving Mother as statutory Guardian—Religious Education of Infants.*

The rule that the father in his lifetime has the absolute right to decide what religious education his children shall receive, and that after his death the guardians of the children are bound to see that they are brought up in the religious faith of their father, is unaffected by the *Guardianship of Infants Act*, 1886. Accordingly, although under that Act a mother who survives the father of her children is now by law their guardian, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by him, she has no greater powers as regards the religious education of the children than those which any guardian, appointed by will or otherwise, had at the passing of that Act; and, unless under very special circumstances, she is bound to see that the children are brought up in the religious faith of the father, whatever that faith may have been.

Where the deceased father was a Protestant and the surviving mother a Roman Catholic the Court, under the powers of the 2nd section of the Act, appointed two Protestants to act jointly with her as co-guardians of the infant children of the marriage, and directed that they should be brought up as members of the Church of *England*.

ADJOURNED SUMMONS.

By the 2nd section of the *Guardianship of Infants Act*, 1886, on the death of the father of an infant, "the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father . . . the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

This was an application by the next friend of the above-named infants, who were three in number, to remove their mother, Mrs. *Scanlan*, from the office of guardian to them, which she held by virtue of the above enactment, and to have two other persons appointed guardians in her stead.

Michael Scanlan, deceased, the father of the infants, was a bootmaker, occupying a humble position in life. He was born at *Kilkee*, in the county of *Clare*, in *Ireland*, in 1845, his father being

a Roman Catholic, and his mother a Protestant, and he was baptized as a Roman Catholic. He appeared, however, to have become a Protestant previously to 1862, and to have connected himself with *Trinity Church, Limerick*. On the 27th of July, 1872, he married Mrs. *Scanlan*, then *Margaret Oakley*, at the Roman Catholic Church of *St. Michael, Limerick*. Mrs. *Scanlan* was at the time of her marriage and continued to be a Roman Catholic. In her deposition made in this matter she stated that her husband "turned Catholic when he married her," but there was no evidence to shew that he was ever in the habit of attending any of the services of that Church, or that he discharged any of the religious duties which the profession of that faith would impose upon him.

Of this marriage three children were born in *Ireland*, viz., *Mary*, born on the 25th of April, 1873, *Ann Olivia*, born on the 25th of October, 1874, and *Alexander James*, born on the 3rd of July, 1876. All three were proved to have been baptized in the Protestant *Trinity Church* at *Limerick*. *Mary* was proved to have been also baptized in the Roman Catholic Church of *St. Michael, Limerick*, and it was stated by Mrs. *Scanlan* that *Ann Olivia* was also baptized there; but no certificate of such baptism was put in evidence.

In or about the year 1879 Mr. and Mrs. *Scanlan* with their three children came to *London*, and thenceforth resided in *Soho* or the neighbourhood. A fourth child, *Margaret*, was born to them there in June, 1880. This child was proved to have been baptized at the Roman Catholic Church of *St. Mary, Warwick Street*, on the 29th of July, 1880, and at the district church of *St. Peter's, Great Windmill Street*, on the 9th of July, 1882.

The son *Alexander James*, died in *England* and was buried at *Finchley Cemetery*, in the Protestant part of the burial ground, the service being read by a clergyman of the Established Church.

The present application related to the three remaining children, viz., *Mary*, aged fifteen, *Ann Olivia*, aged thirteen and a half, and *Margaret*, aged eight years. In October, 1879, *Mary* and *Ann Olivia* were placed at the schools in connection with the district church of *St. Peter's, Great Windmill Street*. How long they remained there did not appear: but there was an entry of

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what seemed to have been a second admission of *Mary* to the same school on the 31st of May, 1880.

On the 18th of September, 1882, these two children were admitted to the Board Schools at *Hart Street, Covent Garden*, and both attended there until the 25th of June, 1883. About the last-mentioned date *Mary* entered the Board School at *Peter Street, Soho*, but left it in a week.

From the 9th of September, 1883, until February, 1884, these two children attended the girls' school attached to the Roman Catholic Church in *Warwick Street*. From February to October, 1884, they attended the girls' school connected with the Roman Catholic Church in *Ogle Street*. In October, 1884, they returned to the Roman Catholic School at *Warwick Street* and continued there until the 3rd of May, 1886. While attending these schools they were taught the doctrines of the Roman Catholic Faith, and were for the first time admitted to the Holy Communion according to the rites of that faith. In the view which the Court took of the evidence all this took place with the knowledge and consent of *Michael Scanlan*, the father.

The third infant, *Margaret*, was admitted into the infant school in connection with the Roman Catholic church at *Warwick Street* in October, 1884, and remained there until March 1885. She, was re-admitted in February, 1886, and remained there until June following.

In 1886, Mr. and Mrs. *Scanlan* ceased to live together. The cause of their separation was not clear; on the one hand, it was attributed to the intemperate habits of the wife, on the other to violence and ill-treatment on the part of the husband. Notwithstanding this separation, Mrs. *Scanlan*, as she stated in her deposition, except during one week, went to her husband's rooms every day.

About the end of 1885, or the beginning of 1886, *Michael Scanlan* began to be visited first by some of the district visitors, and afterwards by some of the clergy in connection with the parish church of *St. Anne's, Soho*. They appeared to have found him far advanced in consumption and in a state of poverty, and thenceforth to the time of his death they relieved his wants.

Through the intervention of the Rev. *Kevill Davies*, curate

of *St. Anne's*, he was admitted in March, 1887, to the *North London Consumptive Hospital*, where he died on the 21st of April, 1887, without having appointed any guardian of his infant children.

Mr. *Davies* stated that he was acquainted with *Scanlan* for six months previous to his death: that he was a member of the Church of *England* and received the communion from him. The Rev. Mr. *Gordon*, the chaplain of the hospital, stated that so long as he was able to do so he regularly attended the Church of *England* services at the hospital and professed himself to be a member of that Church.

In May, 1886, Miss *Wade*, one of the visitors of the parish of *St. Anne's*, at the request of *Michael Scanlan*, procured *Mary*, the eldest child, to be admitted into the *Church of England Home for Girls, Notting Hill*. She proved to be somewhat unmanageable, and was taken away from that home by Mr. *Kevill Davies*, and after a short time she was admitted to *Lord Shaftesbury's Home* at *Sudbury*, near *Harrow*, where she had ever since remained.

Miss *Fanny Skeen*, the mistress of the infant school of *St. Anne's*, stated that on the 6th of June, 1886, *Michael Scanlan* brought his daughter *Margaret* to the school and said that the child's mother wished her to be educated as a Roman Catholic, but that he did not; and he begged that if the mother came to take the child away she might not be allowed to go. From June, 1886, to March, 1887, *Margaret Scanlan* appeared to have attended Sunday school in connection with *St. Anne's*.

The evidence as to the education of *Ann Olivia* between May, 1886 and March, 1887, was less distinct; but Mrs. *Scanlan* in her deposition stated this: "*Mary*, *Ann*, and *Maggie* were all at *Warwick Street School* when I left my husband, and he took them away. They never went to any Catholic school after that. They went to *St. Anne's School*. I expect that was a Protestant school. I used to go to *St. Anne's School* to see my children."

When *Michael Scanlan* entered the hospital in March 1887, he handed over the children, *Ann Olivia* and *Margaret*, to Mr. *Kevill Davies* and asked him to take care of them. Mr. *Kevill Davies* accordingly caused *Ann Olivia* to be placed in the *Marylebone Home for Children*, and obtained her father's written consent to

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her going to *Canada*, where she was sent after his death, and still remained.

Margaret was boarded out in the village of *Moreton-in-the Marsh* under the supervision of Lady *Mitford*.

Two questions arose upon this application, one was whether Mrs. *Scanlan* ought not by reason of her personal character to be removed from the office of statutory guardian to her children; the other was in what religion these children ought to be brought up.

The second of these questions alone is here reported, and the facts and arguments with reference to the first are omitted.

Buckley, Q.C., and *Kirby*, in support of the application:—

The evidence shews that the father of these infants was a Protestant, and that at all events during the latter part of his life he caused them to be brought up as Protestants, and expressed his wish that they should be brought up as members of the Church of *England*.

The father has an absolute right to determine in what religious faith his children shall be brought up; and where the father has in his lifetime expressed his wishes upon that point the Court will not fail to carry them into effect.

And it is the rule that after the father's death the Court, or the guardian, shall have a sacred regard to the religion of the father, and, unless under very special circumstances, shall see that the child is brought up in the father's religious faith, whatever it may have been. These children ought accordingly to be brought up in the Protestant faith, according to the doctrines of the Church of *England*: *In re Agar-Ellis* (1); *Hawksworth* v. *Hawksworth* (2); *In re Newbery* (3); *Skinner* v. *Orde* (4); *Talbot* v. *Earl of Shrewsbury* (5).

Hastings, Q.C., *St. John Clerke*, and *Stokes*, for Mrs. *Scanlan*:—

No doubt it is the rule that the father has the natural autho-

(1) 10 Ch. D. 49, 72, 74; 24 Ch. D. 317.
(2) Law Rep. 6 Ch. 539.
(3) Law Rep. 1 Ch. 263.
(4) Ibid. 4 P. C. 60.
(5) 4 My. & Cr. 672, 686.

rity as to the religious education of his children; but he may by conduct lose his rights in that respect in his own lifetime, and *à fortiori* after his death. Here, from 1883 to 1886 the father permitted his children to attend the schools and be taught the doctrines of the Roman Catholic Church, and with his knowledge and consent the two elder of them were admitted to the communion according to the rites of that faith. It was not until the year before his death, when he was separated from his wife, and under the influence of Protestant clergy, upon whom he was dependent for support, that he changed his mind, and took his children away from the Roman Catholic schools. Under such circumstances the Court will not pay the same regard to his wishes as if his conduct had been consistent: *In re Agar-Ellis* (1); *Hill* v. *Hill* (2); at all events not to the entire exclusion of those of the mother. The rule of law as to the right of the father to direct the religious education of his children after his death arose from the power which the father alone possessed of appointing guardians to his infant children. But now the law has been entirely altered by the *Guardianship of Infants Act*, 1886; and the mother has co-ordinate rights in this respect. By that Act the mother, if surviving, is constituted the sole guardian of her children, if the husband has appointed none, and the joint guardian if he has appointed any. She has all the powers over the person and estate of the infant which she could have had if appointed by the father's will. She can herself appoint guardians by deed or will, and her appointees are entitled to act jointly with those of the father. She is, as statutory guardian, placed in a position which she never occupied before the Act, and as she now possesses that statutory position in addition to her natural rights as a mother, her rights ought to be co-ordinate with those of the father, within the principles laid down by the Master of the Rolls: *In re Agar-Ellis* (3); and she can no longer be denied a directing voice in the religious education of her infant children, who ought in this case to be brought up in the Roman Catholic faith.

(1) 24 Ch. D. 317, 328, 333. (2) 10 W. R. 400; 31 L. J. (Ch.) 505.
(3) 24 Ch. D. 327.

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[They also referred to *In re O'Malleys* (1); *Condon* v. *Vollum* (2); *Storke* v. *Storke* (3); and *Reg* v. *Nash* (4).

Buckley, in reply.

At the close of the arguments, Mr. Justice *Stirling* delivered judgment upon the first question, and held that upon the evidence no sufficient grounds had been shewn for removing Mrs. *Scanlan* from the office of statutory guardian. He held, however, that some one ought to be appointed by the Court, under the powers conferred by the Act, as guardian to act jointly with her; and as the second question, viz., in what religion the children should be brought up, had a material bearing upon the choice of such joint guardian, and was one of great importance upon the construction of the Act, and the powers of the mother as statutory guardian, his Lordship reserved his judgment upon the point.

1888. June 12. STIRLING, J.:—

In this case, for reasons given by me at the close of the argument, I have held that the mother of the infants ought not to be removed from the office of guardian, which she holds by virtue of the provisions of the *Guardianship of Infants Act*, 1886, but that some one ought to be appointed (under the powers comferred by the same Act) to be a co-guardian to act jointly with her. In deciding who shall be chosen as such co-guardian, one main element to be regarded is the religion in which the infants are to be brought up.

The material facts bearing on this question are as follows: [His Lordship then stated the facts of the case, to the effect above set forth, and continued:—]

An examination of the evidence has convinced me that *Michael Scanlan*, although he consented to his children being brought up as Roman Catholics from 1883 to 1886, and to his two elder children receiving the communion according to the rites of that faith, nevertheless, during the last year of his life, caused all three children to be brought up as Protestants, and distinctly

(1) 8 Ir. Ch. Rep. 291.
(2) 3 Times L. R. 686; S.C. 57 L. T. (N.S.) 154.
(3) 3 P. Wms. 51.
(4) 10 Q. B. D. 454.

expressed his wish to be that they should be brought up as members of the Church of *England*. It is said (and with truth) that during this period he was separated from his wife, and was under the influence of the *St. Anne's* clergy, on whom he was dependent for support; but, giving all due weight to these circumstances, I am unable to arrive at the conclusion that his acts and expressed wishes were inconsistent with a genuine desire for the welfare of his children, or with an honest intention to perform faithfully the duties he owed to them as their father.

Now the absolute right of a father in his lifetime to decide what religious education his children shall receive has been laid down in the most positive terms in a case well calculated to test the rule of the Court: *In re Agar-Ellis* (1). Lord Justice *James* says (2): "If a good and honest father, taking into his consideration the past teaching to which his children have been, in fact, subject, and the effect of that teaching on their minds, and the risk of unsettling their convictions, comes to the conclusion that it is right and for their welfare, temporal and spiritual, that he should take means to counteract that teaching, and undo its effect, he is by law the proper and sole judge of that, and we, as Judges of the land, have no more right to sit in appeal from the conclusion which he has conscientiously and honestly arrived at than we should have to sit in appeal from his conclusion as to the particular church his children should attend, the particular sermons they should hear, or the particular religious books to be placed in their hands. He is quite as likely to judge rightly as we are to judge for him. At all events, the law has made him, and not us, the judge, and we cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him." And at the close of the judgment he says (3): "The law trusts to him that he will, rising above all such petty feelings, have a sole regard to what he conscientiously believes to be for the temporal and spiritual welfare of his children; and we, pronouncing what we deem the law to be, must leave the matter to his sense of parental duty and to his conscience."

(1) 10 Ch. D. 49; 24 Ch. D. 317. (2) 10 Ch. D. 74.
(3) 10 Ch. D. 76.

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Further, the law (down to the passing of the *Guardianship of Infants Act*, 1886) was clear that after the death of the father those who have the guardianship of the child are bound to see that the child is brought up in the religious faith of the father. Thus, in *Hawksworth* v. *Hawksworth* (1), Lord Justice *James* says (2): "The rule of the Court is, that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been."

There are, however, cases in which the father may, even in his lifetime, lose the right to have his child educated in his own religion. This was clearly laid down and was given effect to in *Andrews* v. *Salt* (3). Lord Justice *Mellish* says (4): "The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations." Then a little further on he says: "It is clear, however, that a father may, by his conduct, lose his right even in his own lifetime, and much more after his death." He afterwards refers to *Lyons* v. *Blenkin* (5), and to *Hill* v. *Hill* (6), with which I shall hereafter deal. I may read a few words from the judgment of Lord *Eldon* in *Lyons* v. *Blenkin*, in which he says (7): "It is always a delicate thing for the Court to interfere against the parental authority; yet we know that the Court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit,"—that is for the benefit of the children.

The law is similarly stated in *In re Agar-Ellis* (8). Lord

(1) Law Rep. 6 Ch. 539.
(2) Ibid. 542.
(3) Ibid. 8 Ch. 622.
(4) Ibid. 638.
(5) Jac. 245.
(6) 10 W. R. 400.
(7) Jac. 262.
(8) 10 Ch. D. 72; 24 Ch. D. 328, 333, 338

Justice *James* says (1): "No doubt, the law may take away from him" (that is the father) "this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children." There are like statements in each of the judgments which were subsequently delivered in the same case (2). Thus the present Master of the Rolls says (3): "If the father has allowed certain things to be done, and then, out of mere caprice, has counter-ordered them, so as, in the eyes of everybody, to cause an injury to the child, then the Court will not allow the capricious change of mind, although if the thing had been done originally the Court could not have interfered." And Lord Justice *Cotton* says (4): "The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right." And Lord Justice *Bowen* says (5): "The father has the natural authority. Except in cases of immorality, or where he is clearly not exercising a discretion at all, but a wicked or cruel caprice,

(1) 10 Ch. D. 72.
(2) 24 Ch. D. 317.
(3) 24 Ch. D. 328.
(4) Ibid. 333.
(5) 24 Ch. D. 338.

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or where he is endeavouring to withdraw from the protection of the Court, which is entrusted with such protection by law, the custody of the infant, as a rule this Court does not and cannot interfere, because it cannot do so successfully, or I should rather say because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life."

The case of *Hill* v. *Hill* (1) appears to be the case in which this portion of the law has been carried to the furthest extent. It is, perhaps, best reported in 31 L. J. (Ch.) at p. 505. In that case the father was a Roman Catholic and the mother a Protestant. One of the two children of the marriage was baptized first as a Roman Catholic, but afterwards as a Protestant; the other was baptized as a Protestant only. Under the mother's influence the children were educated as Protestants and nothing was ever done by the father to instruct them or procure them to be instructed in the Roman Catholic faith.

He made a will by which he appointed the mother one of the guardians and directed the children to be brought up as Roman Catholics. He was held to have abdicated his right to direct the religious education of his children.

Now if *Michael Scanlan* had died early in 1886, this case would have been an authority for disregarding any wish or direction on his part that his children should be brought up as Protestants; but it seems to me that what took place in and subsequently to 1886 cannot be left out of consideration in deciding the present case. Not only did *Michael Scanlan* remove his children from the Roman Catholic schools, but he took active steps to cause them to be brought up as Protestants. He asserted his right to direct the religious education of his children; and (whatever may have been the reason) Mrs. *Scanlan*, though (as she says) she went to his room every day, did not think fit to offer any opposition to his acts. I am unable to come to the conclusion that these acts of *Michael Scanlan* were done out of mere caprice, so that the Court would have interfered with them in his lifetime; and that being so, I come to the conclusion that under the law as it stood prior to the passing of the

(1) 10 W. R. 400; 31 L J. (Ch.) 505.

Guardianship of Infants Act, 1886, the Court would have been bound to give effect to the wishes and directions of the father as to the religious education of these infants.

It remains to be considered whether that Act has in this respect made any change in the law. Certainly in express terms it has not. There is not a word in the statute from beginning to end on the subject of the religious education of children. The preamble is simply this: "Whereas it is expedient to amend the law relating to the guardianship and custody of infants." The 2nd section provides that, "On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act then from and after the passing of this Act, the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." Then sect. 3 confers a power on the mother by deed or will to appoint any person or persons to be guardian or guardians of the infant after the death of herself and the father of such infant, and where guardians are appointed by both parents they are to act jointly. Then there is a further power enabling the mother by deed or will provisionally to nominate a fit person to act as guardian of the infant; and then sub-sect. 3 provides that: "In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such order or orders regarding the matters in difference as it shall think proper." Then sect. 4 provides that "Every guardian in *England* and *Ireland* under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise now has in *England* under the Act 12 Car. 2, c. 24, or in *Ireland*" under another Act. Then sect. 5, "The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit

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regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act." Now prior to the passing of the Act the position of the mother was this. After the father's death, and in the absence of the appointment by the father of any testamentary guardian, she was at law guardian by nurture: that is, she was entitled to the custody and government of her sons until fourteen, and of her daughters until sixteen. Her position was further such that under the like circumstances it was almost of course on the part of the Courts of Equity to appoint her guardian of her infant children, whether sons or daughters, during their minorities. But she could not herself appoint guardians either by deed or will, nor if the father appointed guardians could she interfere with them: *Talbot* v. *Earl of Shrewsbury* (1). It was held by the Court of Queen's Bench in *Reg.* v. *Clarke* (2) (the well-known case of *Alicia Race*) that where the mother was guardian by nurture she had (unless provision to the contrary had been made by the will of the father) in all respects the same authority which might have been exercised by the father had he survived the mother, and the Court directed the child of a Protestant father to be handed over to a surviving Roman Catholic mother, although she intended to educate the child in accordance with her own religious views. In that same case, however, the child was afterwards made a ward of the Court of Chancery, and directions were given by Vice-Chancellor *Kindersley* that she should be brought up as a Protestant (3).

The strength of the rule of Courts of Equity imposing on a surviving mother the obligation to educate her children in accordance with the religion of their father clearly appears not only from the case to which I have just referred, but from the cases of *Austin* v. *Austin* (4), where the father died intestate

(1) 4 My. & Cr. 672.
(2) 7 E. & B. 186.
(3) See 26 L. J. (Q.B.) 176; 3 Jur. (N.S.) 339, n.; 1 H. & M. 420, n.
(4) 4 D. J. & S. 716.

and the mother was consequently guardian by nurture, and *In re Newbery* (1), where the mother had (along with another) been appointed testamentary guardian. All conflict between the rules of law and equity on the subject ceased upon the coming into operation of the *Judicature Act*, 1873, s. 25, sub-s. 10, which provides that in questions relating to the custody and education of infants the rules of equity shall prevail.

Under the *Guardianship of Infants Act*, 1886, a mother who survives the father of her children is now by law their guardian, either alone, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. As regards her powers as such guardian, they are to be those which any guardian appointed by will or otherwise had at the passing of the Act under the Act 12 Car. 2, c. 24.

What, then, was the duty of such a guardian as regards the religious education of the children committed to his charge? The answer is to be found in the passage I have already cited from *Hawksworth* v. *Hawksworth* (2); the guardian was to "have sacred regard to the religion of the father in dealing with the child, and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religion may have been." And the rule applied none the less that the guardian appointed by the father was the mother. Under the statute it seems to me upon the terms of sect. 4 that the mother is bound to observe this rule.

It was contended, however, that the natural rights of the mother were totally different from those of any guardian however appointed, and that the remarks made by the present Master of the Rolls in *In re Agar-Ellis* (3), as to the natural rights of a father, applied *mutatis mutandis* to the case of a mother. The answer to this appears to me to be that down to the passing of the Act the law recognised the natural rights of the mother only to the extent to which I have mentioned; it was for the Legislature to consider and determine what further recognition should be given to those natural rights; and the legal position of the mother must now be ascertained, not from the consideration of

(1) Law Rep. 1 Ch. 263. (2) Law Rep. 6 Ch. 542.
(3) 24 Ch. D. 317, 327.

STIRLING, J. these natural rights themselves, but by the true construction to be placed upon the language of the Act of Parliament which expresses the determination arrived at by the Legislature on the subject.

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It was further said that the rule of law had its origin in the statutory power of the father to appoint guardians to the children: and that inasmuch as the mother has now co-ordinate power in this respect with the father, she ought now to have co-ordinate power with him in directing the religious education of the children. No doubt the power of the father to appoint guardians of the children afforded the means by which he was enabled to give effect to his views on their religious education; but I think that it cannot be said that it has been conclusively decided that the rule originated in the way alleged. The point was argued and considered in the case of *Skinner* v. *Orde* (1); and Lord Justice *James*, in delivering judgment, says no more than this (2): "It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children." This appears to me sufficient to shew that the rule was not (even in the view of lawyers) so connected with the power of appointing guardians that the Legislature ought to be deemed to have abrogated it merely by conferring on the mother the power of appointing guardians; nor can I suppose that in a matter of so much difficulty and delicacy, the Legislature intended to abolish a well established rule by a side wind, without even a suggestion as to the rule to be substituted for it, and without indicating how a Court is to act when called upon to decide between co-ordinate authorities unhappily unable to agree on questions affecting the religious welfare of an infant.

I think, therefore, that the Act has not introduced any change in the rule as to the religious education of infants, and I must, therefore, direct that these children be brought up as members of the Church of *England*.

His Lordship accordingly appointed two Protestants who had been proposed by the Applicants, and to whom no objection had

(1) Law Rep. 4 P. C. 60. (2) Law Rep. 4 P. C. 70.

been taken on behalf of Mrs. *Scanlan*, to act as guardians along with the mother, and directed them to bring up the infants in the Protestant religion.

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An appeal was presented, but subsequently withdrawn.

Solicitors: *Deacon, Gibson & Medcalf: Leathley & Phipson.*

W. W. K.

C. A.
1887
STIRLING, J.
July 20, 21; *Nov.* 1.
C. A.
1888
July 27, 28, 30; *Aug.* 7.

In re GROVE.
VAUCHER *v.* THE SOLICITOR TO THE TREASURY.

[1885 G. 389.]

Legitimacy—Illegitimate Child—Subsequent Marriage of Parents—Legitimation of Child—Intervening Marriage of Father with another Woman—Domicil—Length of Residence.

In the year 1734, *Marc T.*, a *Swiss*, twenty-two years of age, whose domicil of origin was *Geneva*, came to *England*; and carried on business and resided in *England* from that time until his death in 1779.

Some time after his arrival he formed a connection with *Martha P.*, an Englishwoman, with whom he lived as man and wife. In 1744 he had a daughter by her, who was baptised as his child by the name of *Sarah T.*, and who left issue. Between 1744 and 1747 he had two other illegitimate children by *Martha P.*, who were born respectively in 1745 and 1747, and left no issue. In 1749 he married another Englishwoman named *Elizabeth W.*, and by her he had one child, who was the mother of the intestate in this administration action.

Elizabeth died in 1752, and in 1755 *Marc T.* married *Martha P.* and had legitimate children by her, one of whom, *S. M. T.*, had issue.

By the law of *Geneva* illegitimate children are legitimated by the subsequent marriage of their putative father and their mother notwithstanding an intermediate marriage of their father with another woman and the birth of a child by her.

After the death of the intestate, the descendants of *Sarah T.* (who was born before the marriage of *Marc T.* and *Martha*), and the descendants of *S. M. T.* (who was born after that marriage) set up conflicting claims in the action to be the next of kin of the intestate; and it was held by *Stirling*, J., that *Marc T.* had acquired an English domicil at the date of the birth of *Sarah T.* in 1744, that consequently *Sarah T.* was not legitimated by the subsequent marriage of *Marc T.* and *Martha*, and the descendants of *S. M. T.* alone were entitled as next of kin of the intestate.

On appeal, held by *Cotton* and *Lopes*, L.JJ., that the domicil of *Marc T.* was English, both at the date of the birth of *Sarah T.* in 1744, and of his subsequent marriage with *Martha* in 1755:—

Held by *Fry*, L.J., that the domicil of *Marc T.* was English, at the date of his marriage with *Martha*, but not at the date of the birth of *Sarah T.*

Held by the Court that a child born before the marriage of its father and mother cannot be legitimated by their subsequent marriage unless the father was domiciled in a country whose laws allowed such legitimation, both at the time of the marriage which gave the child the status of legitimacy, and at the time of the birth on which it took from its putative father the potentiality of being legitimated.

Acts, events, and declarations subsequent to the time at which a question of domicil arises are admissible in evidence upon that question when they indicate what the intention was at the given time.

FURTHER CONSIDERATION.

This was an action for the administration of the estate of

Caroline Emilia Grove, a domiciled Englishwoman, who died on the 29th of October, 1866, at the age of eighty-eight, a lunatic and intestate, and possessed of considerable personal estate.

In October, 1867, as no next of kin appeared to claim her estate, letters of administration were granted to the Solicitor to the Treasury; and the Treasury shortly afterwards took possession of the estate.

Two sets of persons subsequently set up conflicting claims to the estate as next of kin of the intestate, *i.e.* the *Vaucher* family and the *Falquet* family, and this action was brought by a member of the former family in 1884.

In the course of the proceedings an inquiry was directed as to who were the next of kin of the intestate, and evidence was gone into from which it appeared that both the *Vaucher* family and the *Falquet* family claimed through the same man, *Marc Thomegay*, and the same woman, *Martha Powis*, under the following circumstances:—

Marc Thomegay, who was the grandfather of the intestate, was born in *Geneva* of *Swiss* parents, in the year 1712, and there was no question that his domicil of origin was Genevese. On the 13th of August, 1728, he was received as a burgess of *Geneva*. In 1729, his father, who was a watchmaker, died in *Geneva*. *Marc Thomegay* was a worker in gold and silver, and in 1734, being then twenty-two years of age, he came to *England*, where he remained until his death in 1779. In the year 1743 a private Act of Parliament was passed, whereby *Peter Thomegay*, the brother of *Marc Thomegay*, and four other foreigners were naturalized as subjects of *Great Britain*, but this Act did not include and made no mention of *Marc Thomegay*.

Some time after the arrival of *Marc Thomegay* in *England*, he formed a connection with an Englishwoman named *Martha Powis*; he cohabited with her for several years, and had by her three illegitimate children, viz., *Sarah*, who was born on the 5th of February, 1744, and was baptised on the 24th of the same month by the name of *Sarah Thomegay*, in the church of *St. Mary, Whitechapel*, where he presented her under his own name and as his daughter; a son, who was born on the 11th of January, 1745, and was baptised on the 16th of February following, in the same

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church; and another daughter, who was born on the 14th of November, 1747, and was baptised on the 13th of December following, in the parish church of *Barking* in *Essex*. These two children were also baptised under their father's name, and as his children.

Sarah Thomegay, on the 19th of December, 1768, married M. *Delom*, a citizen of *Vevey*, and she was the ancestress of the *Vaucher* family.

Elizabeth Thomegay married a M. *Courbel*, a citizen of *Geneva*.

On the 22nd of May, 1749, *Marc Thomegay* was married to an Englishwoman named *Elizabeth Woodhouse*, in the church of *St. Pancras*; of this marriage there was issue one child, viz. *Margaret Sarah Thomegay*, who was born on the 22nd of December, 1749, and was baptised on the 13th of January, 1750, in the church of *St. Leonard's, Shoreditch*. *Margaret Sarah Thomegay*, on the 13th of June, 1788, married an Englishman named *William Grove*, and she died in *London* in the year 1792, having had issue one child only, viz. the intestate *Caroline Emilia Grove*.

Elizabeth Woodhouse died on the 26th of March, 1752, and on the 2nd of February, 1755, *Marc Thomegay* married *Martha Powis*, by whom he had formerly had the three illegitimate children above mentioned.

Of this marriage there was issue four children, one of whom died in infancy. The others were *Jean*, who was born on the 5th of October, 1756, and was baptised on the 29th of the same month in the church of *Westham, Essex*; *Richard*, who was born on the 11th of February, 1762, and was baptised on the 1st of March following, in the church of *St. Leonard's, Shoreditch*; and *Sophie Martha*, who was born on the 12th of November, 1764, and was baptised on the 7th of December following, in the same church.

Of these three children, *Sophie Martha* was the only one who left issue, and she in 1791 married *Jean Louis Falquet*, and was the ancestress of the *Falquet* family.

Martha Thomegay (*née Powis*) died in the year 1772.

In the year 1774 *Marc Thomegay* presented a petition to the Council of *Geneva*, apparently in the interest of his three children

by *Martha Powis* before his marriage with her, in which he stated "that in 1734 he went to *England*, where he now is, that one of the first ties he formed was an attachment for Miss *Martha Powis*, whom he intended to marry as soon as fortune would allow him to do so; that thwarted by circumstances and encouraged by their intention to marry one another as soon as those circumstances would permit, they yielded and lived together for several years as husband and wife; that of this intercourse they had three children." Then after stating the names and dates of the births and baptisms of these children, as above set forth, he stated "that very extraordinary circumstances thwarted the resolution he had formed to marry *Martha Powis*, and induced him to marry Miss *Elizabeth Woodhouse*," and stated the death of his wife *Elizabeth* and his subsequent marriage with *Martha Powis*. Then the petition stated, *inter alia*, that the petitioner, having been informed that in *Geneva*, his native country, subsequent marriage legitimised illegitimate-born children, made application in order to prove, by the certificates there mentioned, the births of his son *Marc*, and his daughters *Sarah* and *Elizabeth*, praying the Council to grant him record of his proofs and declarations, so that no one might question to his above-mentioned three children, their condition of legitimate children in *Geneva*, his native country. An order was made by the Council granting record accordingly, and the births of these three children were entered in the register of births of children of Genevese parents born in foreign parts.

The statements contained in this petition were borne out by the certificates attached thereto, and these certificates were put in evidence in this action.

Marc Thomegay made his will on the 9th of March, 1779, describing himself as of *Tottenham*, in the county of *Middlesex*, and died on the 2nd of December, 1779. From the will it appeared that he was carrying on business in partnership with his son, and was entitled to a leasehold house, workshops, and premises in *Moorfields*, within the parish of *St. Leonard's, Shoreditch*. It did not appear when this lease was granted, but in the baptismal certificates of 1744 and 1745 the parents were described

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as of *Ayliffe Street*, and *Moorfields* was not mentioned in any certificate until the year 1750.

There was evidence that according to the laws of the canton of *Geneva* illegitimate children are legitimated by the subsequent marriage of their father and mother, notwithstanding the intervening marriage of their father with another woman.

The Chief Clerk, by his certificate made in this action, in substance left to the Court the question whether under these circumstances *Sarah Delom* and the other two children born of *Marc Thomegay* and *Martha Powis* during their cohabitation were to be taken as legitimate or not; and found that if *Sarah Delom* ought to be treated as legitimate, then the next of kin of the intestate were the descendants of the said *Sarah Delom*, who were represented by the Plaintiff, and that if not, such next of kin was the *Falquet* family.

The further consideration came on for hearing before Mr. Justice *Stirling* on the 20th of July, 1887.

Hastings, Q.C., and *G. W. Brabant*, for the Plaintiff:—

The Plaintiff is a descendant of *Sarah Delom*, one of the children born during the cohabitation of *Marc Thomegay* and *Martha Powis*. *Sarah Delom* was born in 1744. At that time *Marc Thomegay* had been resident in *England* ten years, but it is submitted that though he had been carrying on business in *London* during that time his Swiss domicil still continued; at any rate, there is no evidence to shew that he intended to remain in *England*.

[STIRLING, J.:—For anything that appears in evidence, he may have intended to remain in *England* till his death, which took place in 1779. He made an English will.]

The residence in *England* no doubt is proved, but what was his intention? He in after years, viz. in 1755, intermarried with *Martha Powis*. The law of *Switzerland*—the domicil being there—allows illegitimate children to be legitimatised by subsequent marriage. *Marc Thomegay* having a Swiss domicil at the time of the birth of his child—the Plaintiff's ancestor—her

legitimacy must be determined according to the law of *Switzerland*. *Re Wright's Trusts* (1), which is a distinct authority in this case; *Munro* v. *Munro* (2); *Lloyd* v. *Lloyd* (3); *In re Goodman's Trusts* (4); *In re Andros* (5); *Dicey* on Law of Domicil (6); *Boyes* v. *Bedale* (7); *Countess of Dalhousie* v. *M'Douall* (8).

Whether a man has abandoned his domicil of origin is always a question of evidence as to his intention, which must be clear and unmistakable, and there is no evidence produced of any intention on the part of *Marc Thomegay* to remain in *England*. Residence, however long, is immaterial, and though *Marc Thomegay's* residence was in *England* up to the time of his death, it was unsettled: *The Lauderdale Peerage* (9); *In re Patience* (10); *Udny* v. *Udny* (11). The Plaintiff's claim, as one of the next of kin of *C. E. Grove* and to share in her estate, ought to be allowed.

W. Pearson, Q.C., and *Haldane*, for *Louis Alexander Falquet* (who had obtained leave to attend the inquiry before the Chief Clerk):—

Marc Thomegay was domiciled in *England* at the time of the birth of *Sarah Delom*, and his subsequent intermarriage with her mother did not legitimatise her. Such legitimisation cannot take place unless allowed by the personal law of the father both at the date of the child's birth and at the date of the father's marriage.

Nationality or naturalisation has nothing to do with the case, but it is purely one of domicil: *Shedden* v. *Patrick* (12); *Strathmore Peerage Case* (13); *Rose* v. *Ross* (14); *Goodman* v. *Goodman* (15); *Countess of Dalhousie* v. *M'Douall*; *Munro* v. *Munro*; *Birtwhistle* v. *Vardill* (16); *Udny* v. *Udny* (17); *Kerr* v. *Martin* (18);

(1) 2 K. & J. 595.
(2) 7 Cl. & F. 842.
(3) 13 Beav. 401, n.
(4) 17 Ch. D. 266, 292–295.
(5) 24 Ch. D. 637.
(6) Pages 181–186, 187–192.
(7) 1 H. & M. 798.
(8) 7 Cl. & F. 817.
(9) 10 App. Cas. 692–758.
(10) 29 Ch. D. 976.
(11) Law Rep. 1 H. L., Sc. 441–456.
(12) 1 Macq. 535; 5 Pat. Sc. App. 194.
(13) 6 Pat. Sc. App. 646.
(14) 6 Bligh. (N.S.) 468; 4 W. & Sh. Sc. App. 289.
(15) 3 Giff. 643.
(16) 7 Cl. & F. 895.
(17) Law Rep. 1 H. L., Sc. 441.
(18) 1 Macq. 650.

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Westlake's Private International Law (1); *Dicey* on Law of Domicil (2). The place of the birth of the child is immaterial: *In re Goodman's Trusts* (3). *Marc Thomegay* had an English domicil at both periods of time—the birth of his child *Sarah Delom*, born out of wedlock, and his subsequent marriage with her mother: *Dicey* on Law of Domicil (4); *Bruce* v. *Bruce* (5); *Bempde* v. *Johnstone* (6); *Doucet* v. *Geoghegan* (7); *Cockrell* v. *Cockrell* (8); *Munro* v. *Munro* (9); *Fraser* on the Personal and Domestic Relations (10); *Re Wright's Trusts* (11).

The proposition as regards the domicil of the father at the birth of his child and at his subsequent marriage has been established, and that is quite sufficient to exclude the claimants whom the Plaintiff represents. The presumption from all the circumstances is that *Marc Thomegay* made up his mind to fix his residence in *England*.

Shearman, and *C. Arnold White*, for three other members of the *Falquet* family, who had also obtained leave to attend the inquiry, and who claimed as next of kin of *C. E. Grove*:—

The domicil of a man is that place in which his habitation is fixed without any present intention of removing therefrom: *Dicey* on Law of Domicil (12); *Attorney-General* v. *Kent* (13).

The evidence is that *Marc Thomegay* had settled in *England* both before and after his marriage with *Martha Powis*. The onus is thrown upon the Plaintiff to shew that he had an intention of removing from *England*.

Ingle Joyce, for the Crown.

Hastings, in reply.

1887. Nov. 1. STIRLING, J. (after stating the facts, continued):—

The question whether in the administration of the personal estate of an intestate who died domiciled in *England*, the Courts

(1) Pages 84–85, sects. 50 and 51.
(2) Pages 181, 184, 187.
(3) 14 Ch. D. 619; 17 Ch. D. 266.
(4) Pages 116, 120.
(5) 2 B. & P. 229, n.
(6) 3 Ves. 198.
(7) 9 Ch. D. 441.
(8) 25 L. J. (Ch.) 730.
(9) 1 Rob. App. Cas. 492.
(10) 2nd Ed. p. 52.
(11) 2 K. & J. 595.
(12) Page 333.
(13) 6 L. T. (N.S.) 864.

of this country will recognise the legitimacy of a child born out of lawful wedlock, is one on which, until recently, there was no express decision. However, the question arose and was decided in *In re Goodman's Trusts* (1). The facts of that case are thus stated by Lord Justice *Cotton* in his judgment in the Court of Appeal (2): "*Rachel Goodman* was a domiciled Englishwoman. She died a spinster, and at time of her death she had neither father, mother, brother, or sister. But two of her deceased brothers left children who survived her. *Leyon Goodman*, one of these brothers, had cohabited with *Charlotte Smith*, and while domiciled in *England* had by her three children. He after the birth of these children removed to *Amsterdam*, and he was thenceforth down to the time of his death domiciled in *Holland*. While domiciled there he, in the year 1821, had by *Charlotte Smith* another child, *Hannah*, the present Appellant, afterwards the wife of *Jean Pieret*. *Leyon Goodman*, in the year 1822, married *Charlotte Smith*. The evidence shews that by the law of *Holland* this marriage made *Hannah Pieret* and the three children born while *Leyon Goodman* was in *England* legitimate. Under the *Statute of Distributions* (22 & 23 Car. 2, c. 10), the personal estate of *Rachel Goodman* as to which she died intestate was divisible amongst the children of her deceased brothers. No claim was made on behalf of the three children of *Leyon Goodman* born while he was domiciled in *England*, but *Hannah Pieret* claimed to share." Under those circumstances, Sir *George Jessel* decided against the claim, but in the Court of Appeal the decision was reversed, and it was held by the majority of the Court, consisting of Lord Justice *James*, and Lord Justice *Cotton*, against the dissent of Lord Justice *Lush*, that *Hannah Pieret* was entitled to share in the estate of *Rachel Goodman*. By that decision I am bound, and it is my duty to ascertain the principle on which it was founded, and to apply it accordingly. The most material portion of the judgment of Lord Justice *Cotton* appears to me to be that where his Lordship said (3): "If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents

(1) 17 Ch. D. 266. (2) 17 Ch. D. 290.
(3) 17 Ch. D. 292.

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were domiciled at his birth, that is, on his domicil of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of *England*, except in the case of succession to real estate in *England*, recognises and acts on the *status* thus declared by the law of the domicil." Lord Justice *James* stated his concurrence in the judgment of Lord Justice *Cotton* both in the conclusion and reasoning, and afterwards said (1): "But the question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised in all other civilised communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin —the law under which he was born"; by which I understand the learned Judge to mean, not the law of the place where he was born, but, as it was expressed by Lord Justice *Cotton*, the law of the place where his parents were domiciled at his birth. If the parents have different domicils (as may happen where they are not married), the authorities shew that the domicil of the father is to be regarded, and not that of the mother. Thus it was held in *Munro* v. *Munro* (2), that the children of a domiciled Scotchman resident in *England*, and of a domiciled Englishwoman, were legitimatised by a marriage between them celebrated in *England* after the birth of the children. On the other hand, it was held in *Re Wright's Trusts* (3), that the children of a domiciled Englishman resident in *France*, and a domiciled Frenchwoman, were not legitimatised by a marriage solemnised between them in *France* after the birth of the children, even though the father had subsequently to the birth of the children, but before the marriage, become domiciled in *France*. The Vice-Chancellor, Sir *William Page-Wood*, said (4): "In the case before me, no importance can be attributed to the fact of the mother being a Frenchwoman. A domiciled Englishman having a child

(1) 17 Ch. D. 296.
(2) 7 Cl. & F. 842.
(3) 2 K. & J. 595.
(4) Ibid. 610.

before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicil." "How," he added, "can such a question be affected by the law of any other country in which the child may happen to be born?" The case of *Re Wright's Trusts* (1) was cited in the Court of Appeal in *In re Goodman's Trusts* (2), and was thus dealt with by Lord Justice *Cotton* (3): "*Re Wright's Trusts*, also a decision of Lord *Hatherley* when Vice-Chancellor, is not inconsistent with the opinion already given by me, and explains how the children of *Leyon Goodman* born while he was domiciled in *England* make no claim. They, like the children excluded by the Vice-Chancellor in *Re Wright's Trusts*, were born while their parents were domiciled in a country by the law of which no subsequent marriage of persons domiciled there could legitimate children born before their marriage. The exclusion of these children is therefore in accordance with the rule as to *status* already expressed by me."

In applying, therefore, the principle laid down by the Court in *In re Goodman's Trusts* to the present case, it is of fundamental importance to ascertain what was the domicil of *Marc Thomegay* at the date of the birth in February, 1744, of *Sarah Thomegay*, afterwards *Delom*. [His Lordship then stated the evidence and continued:—] Now the evidence as to the history of *Marc Thomegay* is somewhat scanty.

Marc Thomegay died on the 2nd of December, 1779. As I have already observed, his domicil of origin was Genevese, and in order that a new domicil on his part may be established, it must be shewn that he fixed his residence in *England* with the intention of continuing there for a period not limited by time: *Udny* v. *Udny* (4), *King* v. *Foxwell* (5). That he resided in *England* from 1734 to 1744, and thenceforward to his death in 1779, a period in all of forty-five years, is not disputed. What is the inference as to his intention? "If you shew," said Sir *George Jessel*, in *King* v. *Foxwell* (6), "that a man resides in one place for a length of time, the inference is that he intends to reside there

(1) 2 K. & J. 595.
(2) 17 Ch. D. 266.
(3) Ibid. 295.
(4) Law Rep. 1 H. L., Sc. 441.
(5) 3 Ch. D. 518.
(6) Ibid. 520.

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permanently, unless there is something to rebut it." And in that case it was held, that residence in the *United States* for fifteen years was, in the absence of anything to rebut it, evidence of an intention to reside there permanently. Again, in the case of *Cockrell* v. *Cockrell* (1), Vice Chancellor Sir *Richard Kindersley* (2) thus dealt with the question of time: "Length of time is considered one of the *criteria*, or one of the *indicia*, from which the intention to acquire a new domicil is to be inferred, and it is considered a very material ingredient in the consideration of the question. In the case of *The Harmony*, before Lord *Stowell*, which is reported in the 2nd volume of *Robinson's* Admiralty Reports, Lord *Stowell* said at page 324: 'Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil.' Some foreign jurists have suggested, if they have not actually laid it down, that a period of ten years' residence ought of itself to be a sufficient indication of the intention to acquire a new domicil. But, certainly, that is not the view of the law that has been adopted by English jurists generally, and I think it is impossible to lay down any precise period which *per se* is to constitute domicil. At the same time, if a man goes to another country and continues to reside there for a considerable period, as in this case for a period of ten years, without saying that a residence of ten years is necessary, or that ten years is the period sufficient, still, the fact of his residing there for ten years is a very strong indication of his intention to establish his home and domicil in that place. In this case, not only did Mr. *Cockrell* reside at *Calcutta* for the period I have mentioned, but he died there; and if he had lived to this present time, there is nothing to indicate that he would not still be residing there, and carrying on business as a merchant."

In the case before me we have in the year 1744, not merely a previous residence for ten years, but we have this also, that he subsequently resided in *England* for a period of not less than thirty-five years. Further, in 1744, *Thomegay* had formed that connection with *Martha Powis* which he described himself as intended to be of a permanent character, and ultimately to terminate in marriage, and they were living together, as he stated

(1) 25 L. J. (Ch.) 730. (2) 25 L. J. (Ch.) 732.

in his petition, as man and wife. That again is an indication, though perhaps not a strong one, of an intention to reside in *England*, and was relied upon in the case of *Shedden* v. *Patrick* (1) by Lord *St. Leonards*.

It appears to me, therefore, that there is in the present case evidence that in 1744 *Marc Thomegay* intended to reside in *England* permanently. What is there against it? Only this, that in 1743 an Act of Parliament was passed naturalizing a considerable number of foreigners, one of whom was *Peter Thomegay*, a brother of *Marc*, but not *Marc* himself.

This may possibly be evidence, that *Marc* did not, in 1744, desire to change his nationality, and indeed there is no evidence that he desired to do so at any period of his life. But nationality and domicil are two different things.

"The question of naturalization and of allegiance," said Lord *Hatherley*, in *Udny* v. *Udny* (2) "is distinct from that of domicil. A man may continue to be an Englishman" [or a Genevese] "and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself."

In *King* v. *Foxwell* (3) the testator was held to have abandoned an acquired domicil in the United States of *America*, although he was shewn to have carefully preserved to the day of his death a certified copy of a rule of the American Courts admitting him as an American citizen.

In my opinion the true result of the evidence is that although *Marc Thomegay* was not unwilling to retain the benefit of his Genevese nationality and citizenship, his intention in 1744 and afterwards was to make *England* his permanent residence, and consequently he had in that year acquired a domicil in *England*.

It follows that the present case is governed by the decision in *Re Wright's Trusts* (4), and there must be a declaration that the *Falquet* family are the next of kin of the intestate; the costs of all parties must be paid out of the fund, and the residue of it will be divided amongst the next of kin.

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(1) 1 Macq. 535; 5 Pat. Sc. App. 194.
(2) Law Rep. 1 H. L., Sc. 452.
(3) 3 Ch. D. 518.
(4) 2 K. & J. 595.

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The Plaintiff appealed. The appeal came on for hearing on the 27th of July, 1888.

Hastings, Q.C., and *G. W. Brabant*, for the Appellant:—

We accept the law as laid down by Mr. Justice *Stirling*, but we dispute his application of it to the facts. The domicil of origin was Genevese, and the tribunal at *Geneva* was satisfied that from 1744 to 1749 *Marc Thomegay* was domiciled in *Geneva*. The Court will give credence to that. We can hardly contend that it is *res judicata*; but it, at all events, amounts to a declaration by *Marc Thomegay* that he did not mean to give up his domicil of origin, and it has an important bearing on the question whether there was that combination of actual residence elsewhere and intention permanently to reside elsewhere which is necessary to get rid of the domicil of origin.

Mere length of residence is not enough, and so far as there is any evidence of intention, the omission of *Marc* from the Act by which his brother was naturalized, and the statements by *Marc* himself in the petition he presented in 1774, shew an intention on *Marc's* part to retain his Genevese domicil.

[They cited *Cockrell* v. *Cockrell* (1); *King* v. *Foxwell* (2); *In re Patience* (3); *Udny* v. *Udny* (4).]

W. Pearson, Q.C., and *Haldane*, for the Respondent, *L. A. Falquet*:—

It is not necessary for us to shew any intention on the part of *Marc Thomegay* to change his domicil of origin. But, on the other hand, there is nothing to shew any intention on his part to retain his domicil of origin, for his omission from the Act of 1743, and the allusion in the petition to *Geneva* as his native country, if these can be regarded at all, only go to the question of nationality and not to that of domicil. Where there is the *factum* of residence for an unlimited time the *animus manendi* must be inferred; and a domicil of choice may be acquired without any evidence of intention to change: *Doucet* v. *Geoghegan* (5);

(1) 25 L. J. (Ch.) 730.
(2) 3 Ch. D. 518.
(3) 29 Ch. D. 976.
(4) Law Rep. 1 H. L., Sc. 441, 458.
(5) 9 Ch. D. 441.

Udny v. *Udny* (1); *Haldane* v. *Eckford* (2); *Douglas* v. *Douglas* (3); *King* v. *Foxwell* (4); *Taylor* on Evidence (5). The intention of *Marc Thomegay* is to be deduced from his subsequent as contemporaneous acts; for acts and declarations after the date at which the question of domicil arises are not evidence of the intention at the given date.

[LOPES, L.J. :—I should require strong authority before I held that subsequent facts and declarations could not be gone into.]

The whole history of *Marc* subsequent to his arrival shews clearly that he came to *England animo manendi*. The domicil both at the birth of *Sarah Thomegay* and at the marriage of *Marc Thomegay* with *Martha Powis* must be considered in this case. In almost all the previous cases in which the question of legitimation by subsequent marriage has arisen the domicil has been admittedly the same at the birth of the child, and at the marriage of the parents: *Munro* v. *Munro* (6); *Udny* v. *Udny*. Here that may not be the case. We say, indeed, that the domicil of *Marc Thomegay* was English at the birth of *Sarah* in 1744, and, *à fortiori*, English at his marriage with *Martha Powis* in 1755. But if the domicil was Swiss in 1744 and English in 1755 it is equally fatal to the legitimation of *Sarah*. For while the domicil of the father at the birth gives or does not give to the child the capacity of being legitimated, it is the marriage which legitimates; and unless the father is domiciled in a country where legitimation is tolerated, the marriage will not legitimate. So the domicil both at the birth and at the marriage must be in a country where legitimation is allowed. The principle on which this is founded is that marriage being a personal contract is regulated by the law of the domicil, and the law of the domicil of the putative father attached to the child at its birth, and by English law its bastardy was indelible: *Re Wright's Trusts* (7), in which case the domicil of the putative father was English at birth and French at the marriage: *Shedden* v. *Patrick* (8).

(1) Law Rep. 1 H. L., Sc. 441.
(2) Ibid. 8 Eq. 631, 640.
(3) Ibid. 12 Eq. 617, 640.
(4) 3 Ch. D. 518.
(5) 6th Ed. sect. 525; 7th Ed. sect. 588.
(6) 7 Cl. & F. 842, 876; 1 Rob. App. Cas. H. L. 584.
(7) 2 K. & J. 595.
(8) 1 Macq. 535; 5 Pat. Sc. App. 194.

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Lastly, English law only recognises legitimation by comity, and assuming that the domicil both at birth and marriage was Genevese, then, according to civil and canon law, the marriage relates back to the period when the conception of the child took place, to which time the contract for the future marriage must be referred; and so an intervening marriage with, and the birth of other children by, another woman would render legitimation of the former illegitimate offspring impossible: *Birtwhistle* v. *Vardill* (1); *Kerr* v. *Martin* (2).

Shearman, and *C. Arnold White*, for the other members of the *Falquet* family:—

It is no longer the law that subsequent acts and declarations are not receivable as evidence of intention at a previous time. They are part of the *res gestæ*: *King* v. *Foxwell* (3); *Attorney-General* v. *Kent* (4); *Rouch* v. *Great Western Railway Company* (5); *Rawson* v. *Haigh* (6); *Aikman* v. *Aikman* (7); *Re Wright's Trusts* (8). In *Munro* v. *Munro* (9) the crucial date was in September, 1801, and what was done in 1802 was discussed. Here the crucial date must be that of the act by which the legitimation was effected, *i.e.* the marriage, and the evidence of an English domicil at that time is overwhelming.

Hastings, in reply.

1888. Aug. 7. COTTON, L.J.:—

This is an appeal by the Plaintiff, who represents the *Vaucher* family, from a decision of Mr. Justice *Stirling* in favour of the *Falquet* family. Both the Appellant and the *Falquet* family claim through the same man, *Marc Thomegay*, and through the same woman, *Martha Powis*, with this distinction, that the Appellant claims descent from *Sarah Thomegay*, the eldest child of *Marc Thomegay* and *Martha Powis*, who was born before the

(1) 2 Cl. & F. 571, 585; 7 Cl. & F. 895.
(2) 1 Macq. 650.
(3) 3 Ch. D. 518.
(4) 31 L. J. (Ex.) 391.
(5) 1 Q. B. 51.
(6) 2 Bing. 99, 104.
(7) 4 L. T. (N.S.) 374; S. C. 3 Macq. 854.
(8) 2 K. & J. 595.
(9) 7 Cl. & F. 842, 876; 1 Rob. App. Cas. 584.

marriage of her father and mother, and the *Falquet* family claim descent through a child of the same parents, but born after the marriage of the father with the mother. The question we have to decide is as to the legitimacy of *Sarah Thomegay*.

Now, if the matter is to be decided by the law of *England*, *Sarah Thomegay* must of course be considered as illegitimate, but the question really depends on the law of the domicil, for there are many countries—*Scotland* and *Geneva*, for instance—where a child born previous to the marriage of its parents may be made legitimate by the subsequent marriage of those parents: and we must consider whether *Marc Thomegay* had lost his Genevese domicil of origin and acquired an English domicil, so that the English law has to determine the question of *Sarah Thomegay's* legitimacy, or whether that question is to be decided by the law of *Geneva*. As I have said, the question of legitimacy or illegitimacy depends on the law of domicil, but there is the further question as to the time at which the father must be domiciled in the country where the law allows the legitimation by subsequent marriage of a child born before marriage; and it was contended that Mr. Justice *Stirling* had laid down that the only time to be considered was the time of the birth of the child, and that he had done so on the authority of a decision of the Court of Appeal in *In re Goodman's Trusts* (1) and particularly in reliance on my judgment in that case. On reading his judgment carefully, I do not think he decided the question, but he did look at what was the domicil of the father at the time of the birth of the child, and coming to the conclusion that at that time the father was domiciled in *England*, he decided that the child *Sarah* must be considered as illegitimate. I think, however, that although it may not be necessary to enter into the question, I ought to say something upon the law as to the time when it is necessary that the domicil of the father should be that of a country whose laws allow legitimation by subsequent marriage; because the expressions which Mr. Justice *Stirling* quoted from my judgment in *In re Goodman's Trusts* might seem to bear the construction that the only time to be considered is the time of the birth of the child. That was a question which had not really to be considered, or in any way

(1) 17 Ch. D. 266.

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decided, in *In re Goodman's Trusts* (1), because the real question there was, whether the fact of the father going to *Holland*, and in our view acquiring a domicil there before the birth of the child, had the effect of making that child legitimate, according to the law of *England*, and entitled to participate in the personal estate of the intestate. If the father there was domiciled in *Holland* at the time of the birth of the child, undoubtedly he was domiciled there also at the time of the marriage, because he continued to live in *Holland* from the time of the birth of the child, and a short time afterwards he married in *Holland*. Therefore the question had not to be considered, and I think it is the first case which decided, contrary to the *dictum* of Lord *Hatherley*, when Vice-Chancellor, in *Boyes* v. *Bedale* (2), that in considering who were the next of kin in *England* of an intestate dying in *England*, if the law of the domicil said that the child was legitimate, that, except as regards real estate in *England*, ought to determine its status for all purposes in *England*. What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has at its birth in consequence of its father's domicil the capacity of being made legitimate by a subsequent marriage.

Where then must that marriage be? It is singular that there is, as far as I am aware, no express decision on that point. But this is probably because as a rule when the parties have been domiciled at the time of the birth in a country allowing legitimation of a child born before marriage, that same country has been their domicil at the time of their marriage. As I said before, the place of birth and the place of marriage is immaterial to the question of domicil. In the absence of authority the incidents and the effects of a marriage must, in my opinion, depend on the domicil of the parties at the time of the marriage; and it will be strange if a marriage in *England*, between persons domiciled in *England*, could produce an effect which by English law is not attributed in any way to marriage. As I

(1) 17 Ch. D. 266. (2) 1 H. & M. 798.

have said, there is no authority on this point, but there are Scotch cases in the House of Lords which have dealt with the question. In *Munro* v. *Munro* (1) the domicil at both periods was considered, and so I think it was in *Udny* v. *Udny*. In *Udny* v. *Udny* (2) the Lord Chancellor, Lord *Hatherley*, in dealing with this matter, used expressions which clearly shew his view to have been that the domicil must be, both at the time of the marriage and at the time of the birth, in a country the law of which allows legitimation by subsequent marriage. What he says is this (3): "If his domicil be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro* v. *Munro*) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in *France*, or by marriage only, as in *Scotland*. I do not think that the English law can recognise a capacity in any Englishman, by a change of domicil, to cause his paternity and consequent power of legitimation to be recognised." There he intimates that a subsequent marriage with the incidents which the law of the domicil allows to marriage, must give to the child born before marriage, born of the father whose domicil is of the country which gives it, a capacity of legitimation. That, I think, is the reasonable conclusion. I think Lord Justice *Fry* rather takes a different view from mine as to the time when the domicil in this case became English, and therefore I thought it right, especially as my own judgment in *In re Goodman's Trusts* (4) has been probably misunderstood, to express my view as to what is the law applicable where there was a different domicil at the birth, from that which there was at the time of the marriage. In my opinion, the domicil at birth must give a capacity to the child of being made legitimate, but then the domicil at the time of the marriage, which gives the status, must be domicil in a country which attributes to marriage that effect.

Now we have to consider what was the domicil here at the

(1) 7 Cl. & F. 842.
(2) Law Rep. 1 H. L., Sc. 441.
(3) Law Rep. 1 H. L., Sc. 448.
(4) 17 Ch. D. 266.

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time of the birth, and it may be necessary to consider what it was at the time of the marriage. The domicil of origin of *Marc Thomegay* was undoubtedly Genevese, and Genevese law seems to allow legitimation, even although there is, what happened in this case, a marriage with another woman between the birth of the child and the marriage with the mother, which perhaps is very special in that respect. At the early age of twenty-two, *Marc Thomegay*, having been at sixteen made a burgess of *Geneva*, came to *England*. Before going into the facts of the case, I will read one passage from the judgment of Lord *Westbury* in *Udny* v. *Udny*, which lays down what is sufficient to acquire a domicil of choice, and give up the domicil of origin. His Lordship says (1): "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi* can be inferred, the fact of domicil is established." I think I expressed it in the case which came before the Court, that if a man takes up his residence with an intention of making a permanent residence in a country, then he loses his domicil of origin, and acquires a domicil of choice in that country.

Now in 1734, *Marc Thomegay* came to *England;* his father was a watchmaker, and he himself seems to have been a worker in silver and gold. It is a remarkable case in this respect—that we know really very little indeed of the history of the man, nor do we get any information, except what I shall have to refer to, as regards his intention; and we have to infer his intention from

(1) Law Rep. 1 H. L. (Sc.) 458.

the facts which are before us; but he came, as I say, to *England* in 1734. I do not give any opinion whether he came to *England* with the intention of making that his permanent residence, but the child *Sarah* was not born till the year 1744, that is to say, ten years after he had been in *England*, and if he had then died, I should not, without knowing anything more, have had any difficulty in deciding what his domicil was at that time, but in my opinion we can regard his subsequent acts, and his subsequent life, in deciding whether in 1744 he had determined permanently to reside in *England*, where, on the evidence, he resided without any change from the year 1734 to the time of his death, in 1779.

Then, as I say, after the birth of the child born of the connection which he had previously formed with an Englishwoman, *Martha Powis*, he resided in *England* down to 1779, and it is to be observed that there was this change in his position, that at first he was a mere working jeweller, apparently without any shop; and that he afterwards occupied a leasehold shop or factory, and eventually, when his success in life was established, took a residence at *Tottenham*; and it appears that from 1734, down to his death, he did reside in *England*. It is true there was some little change in the place of his residence in *London*; at first he seems to have lived in *Whitechapel*, for the two first children he had by *Martha Powis* before marriage were baptised in *Shoreditch*, and the third one (and this fact was relied upon by the Appellant) was baptised at *Barking*. But *Barking* is not far from the East end of *London*, and it may very well be that having still his residence at the East end of *London*, in *Shoreditch* or *Whitechapel*, he may have been down there temporarily, or *Martha Powis* may have been there, and the child born there and baptised there, and we find him residing continuously in the East of *London*, and, to my mind, there is no event which can be fixed upon as shewing a change of residence at any particular point in his history. He formed this connection with *Martha Powis*, and in 1749 he married another woman, and then after this date he married again, marrying this time *Martha Powis*. The marriages were at different churches in *London*, the first one being at *St. Pancras* church, and that is, to my mind, not only material as shewing the mere fact of residence, but that he was much more

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permanent in residence than apparently most people in the same class would be now, and my conclusion is that in 1744, when he had been residing in *England* for ten years, he was then, as shewn by the future course of events, residing in *England* with the intention of making it his permanent residence. That is the conclusion at which Mr. Justice *Stirling* arrived, and I agree with him, that at the time of the birth of *Sarah Thomegay*, *Marc Thomegay* was a domiciled Englishman, and that therefore she was incapable of being legitimised.

But if he was domiciled in *England* at the time of the birth of *Sarah*, the eldest child, it is much more clear to my mind that he was domiciled there at the time of his marriage with *Martha Powis*, which did not take place till 1755, not long after the death of *Elizabeth Woodhouse*, whom he first married. Therefore, in my opinion, there was a domicil at these two important periods in *England* which is, to my mind, fatal to the legitimation of *Sarah Thomegay*.

Before I leave the case, I should like to mention the points relied on by the Appellant. The first point in order of date was, that in 1743, his brother and various other people, who had apparently come from *Geneva*, obtained an Act of Naturalisation in which *Marc Thomegay* was not mentioned, although all these people were persons apparently associated with him. If he had been included in that Act, that would have been decisive as to his intending permanently to reside in *England*, and becoming a naturalised Englishman, but naturalisation and domicil are very different things. A man may be domiciled in *England*, although all his life he is a foreign subject, and it very often happens that that is so, and although if he had been included in that Act, that would have been conclusive as against *Sarah*, yet, to my mind, his not being included in it does not assist her in the contention on this appeal, that in 1744 he was domiciled in *Geneva*.

Then there was another point which was much relied on, and caused a good deal of discussion on many grounds, namely, a decree which was made by the Council in *Geneva* in 1774. That is a curious document certainly, but we must recollect this, that shortly before the time when he presented the petition on which that decree was made, two of his daughters, *Sarah* and another

daughter, had married, and had gone to *Switzerland*, and of course it would be material for them, if they could do so, to establish their legitimacy by proceedings in the Court of *Geneva*. That very much accounts for that petition, and for the statements in it. In my opinion those statements cannot be looked upon in any way as declarations influencing our decision as to the domicil of *Marc Thomegay*. Mr. *Graham Hastings* contended that the hope and thought of this man had been, since the birth of *Sarah* down to the time he presented the petition, to secure to himself the benefit of the law of his own country, and so to legitimatise his children by *Martha Powis*. I cannot attribute that intention to him, because I do not think he would be sufficiently acquainted with the law of *Geneva* to know that contrary to the law of *England* he could legitimatise those children, especially after his marriage with *Elizabeth Woodhouse*. It is true that every one is dealt with and his contracts are acted upon as if he knew the law of this country, but that is not imputing to any person the actual knowledge of the law, and to my mind we cannot consider he had any such intention from the fact of his presenting that petition; and, although in my opinion acts subsequent to 1744 are to be considered for the purpose of deducing from them, if we can, what was his intention when residing in *England* in 1744, and although declarations contemporaneous, or nearly contemporaneous with subsequent acts, are to be taken into account, yet, in my opinion, we cannot look to the petition which he presented to the Court of *Geneva* in any way as a declaration available here on behalf of the Appellant as casting any light upon, or to be taken into account in considering with what object, or with what intention he was residing in *England* in 1744, or at any period before the presentation of that petition. And unless it is shewn *aliunde* that the domicil of *Marc Thomegay* at the time when he presented that petition was Genevese, we cannot look at that petition or that judgment. If it be established by other evidence that at the time he presented it, and the time judgment was given, he was subject to the law of *Geneva*, by still retaining his domicil there, we should then have to consider what was the real effect of that judgment as regards the *status* of his daughter; but as it is not shewn by

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evidence that at the time he presented that petition he was domiciled in *Geneva*, we have not to consider what is the effect of that judgment. In my opinion, therefore, that petition and that order do not assist the Appellant, and cannot be considered by us in deciding this case.

The judgment of Mr. Justice *Stirling* was, in my opinion, right, and this appeal accordingly fails.

FRY, L.J. :—

I agree entirely with the conclusion arrived at by the Lord Justice, and I am glad to say that I also agree in the law which he has laid down, but the facts of the case influence my mind somewhat differently, and I pick my way through those facts to the same conclusion by a somewhat different course. I will, therefore, endeavour to state, as briefly as I can, the view I take of this case.

The Appellant claims through *Sarah Thomegay*, who was born in 1744, in this country, and was an illegitimate child of *Marc Thomegay* and *Martha Powis*. At birth that child took the domicil of its mother and it took the status of illegitimacy, according to the law of the domicil of its mother, and it took also the capacity to change that status of illegitimacy for one of legitimacy, provided that according to the law of the domicil of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicil and *status* from the mother, but taking the potentiality of changing its *status* from the putative father. That I take to be the law applicable to this case, and that gives rise to the first question, what was the domicil of the father in the year 1744? According to my view of the case there is not sufficient evidence to lead me to the conclusion that the domicil of origin had been changed by *Marc Thomegay*. The law I take to be plain, and it is laid down by Lord *Cottenham* in the case of *Munro* v. *Munro* (1), in these words: "The domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and acquiring another as his sole domicil." Now, the facts we have before us are shortly these:—We have a young

(1) 7 Cl. & F. 876.

man of Genevese origin and Genevese domicil, made a burgess of the state of *Geneva*, coming to *England*, apparently as a workman, visiting *London*, and settling down there. The conclusion at which I should arrive is, that in all probability he did not come with any intention of permanently residing in *England*. We cannot shut out from our minds the general knowledge which we possess of the habit of foreign workmen of passing some time in wandering, nor can we shut out from our minds the knowledge which we also possess, that it was a common habit amongst the *Swiss* and the inhabitants of the neighbouring states, of which *Geneva* at that time was one, to visit the European capitals, and then return and spend their old age at home.

The conclusion, therefore, at which I should arrive, without any particular evidence, in this case, is that *Marc Thomegay* came to *England* without any intention of abandoning his domicil of origin. Having so come to *England*, he seems to have laboured as a workman here, and to have formed the connection with an Englishwoman which resulted in the birth of *Sarah Thomegay*. Practically that is all we know down to the date of the birth. Now, pausing there, we have not enough evidence to my mind (though I agree there is some evidence) to satisfy us of any intention to abandon the domicil of origin, and I think the domicil of origin, therefore, unless there be other evidence, would adhere. Then if I look at subsequent events, which I agree, when they indicate what the intention at a given time was, are admissible evidence, they seem to me equally consistent with *Thomegay's* having changed his domicil in 1744, or having changed it at a somewhat later date. If I were to speculate as to the true time when, according to my view, he changed his domicil, it would be when, dropping an illicit connection with one Englishwoman, he contracted a legitimate English marriage in this country. I think, therefore, that according to the true conclusion it must be taken that the domicil of the father was Genevese at the date of the birth of *Sarah* in 1744.

If his domicil were English, there would be an end of the case; if the domicil were Genevese, as I hold, then arises the second question, which is this: What was his domicil at the date of the subsequent marriage of the parents in 1755? It appears to me

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that the domicil governs the effects of the marriage. That I take to be the general law, and it is so laid down by Mr. Justice *Story*, in the 189th paragraph of his work on Conflict of Laws: "In a general sense the law of the matrimonial domicil is to govern in relation to the incidents and effects of marriage." If, therefore, the subsequent marriage was governed by the English domicil it would seem to follow that no legitimation can take effect. If, on the contrary, the subsequent marriage is governed by Genevese domicil, it would seem that subsequent legitimation does take effect. It may be, though on this point no evidence has been adduced, that the Genevese law would recognise an English marriage as legitimating the previously born issue. Whether that be so or not I do not know, but even if it be, my conclusion is, that we should not follow the Genevese law, if it gave a greater effect to a marriage contract in *England* when the parents have an English domicil, than the English law gave to it; and for this reason, that the state imposes on all persons domiciled in it, its own conclusions as to the effect of marriage. Here again I would refer to the same paragraph in Mr. Justice *Story's* Conflict of Laws, where, citing the judgment of Lord *Robertson*, a Scotch Judge, he says: "Marriage is a contract *sui generis*; and the rights, duties, and obligations which arise out of it are matters of so much importance to the wellbeing of the state, that they are regulated not by the private contract, but by the public laws of the state, which are imperative on all who are domiciled within its territory." I would remark again, that I entirely agree with what has been said by Lord Justice *Cotton*, with regard to the effect of the cases of *Munro* v. *Munro* (1) and *Udny* v. *Udny* (2) on this question of law, and I think that they very strongly support the conclusion which I have endeavoured to express.

Now, that being so, we come back to the question of fact, where was *Marc Thomegay* domiciled in 1755 when he contracted marriage with *Martha Powis?* In my judgment his domicil was English. I think we have a case in which residence, so far as we can tell, originally beginning *sine animo manendi* or even *animo revertendi*, has changed its character, and the *animus manendi* has grown up and been manifested in the meantime.

(1) 7 Cl. & F. 842. (2) Law Rep. 1 H. L., Sc. 441.

The facts from which I draw my conclusions are these. We have eleven years or more continuous residence in this country. We have, and on this I rely very greatly, a legitimate marriage contracted with an Englishwoman according to the rites of the English Church, and the birth of legitimate issue in this country, and their baptism according to the rites of the English Church. More than that, at the time of the second marriage he must be taken to have entered into another contract with an Englishwoman, this time casting aside the illicit contract which had existed between them and entering into a lawful contract of marriage. Further than that, there is the fact that by this time he had established himself in leasehold premises in *Moorfields*, apparently carrying on business on his own account. I think, therefore, taking the facts down to 1755, that the true conclusion from them is different from what it was in 1744; that at the later date he had abandoned his domicil of origin, and had assumed *England* as his domicil; and that consequently the English law of marriage must govern the effects of the marriage then contracted, and that English law would not allow subsequent legitimation. I come, therefore, to the same conclusion, though by a somewhat different course, as that of my learned Brother.

There is one more observation I desire to make, which is this, that again in 1755, when I consider the subsequent events, they do not appear to me to alter the conclusion at which I have arrived. These subsequent events are relied upon by both sides.

One side relied on the effect to be attributed to the statement in the petition to the Genevese Council in 1774, the other side insisting on the continuation of residence and the acquiring of a home at *Tottenham*, and of his dying in this country. It appears to me that those subsequent events again are by no means conclusive as to what his mind was in 1755, and I find nothing in them to shake the conclusion at which I have arrived from preceding events, that in 1755 he had acquired an English domicil. The petition to the Genevese Council no doubt at first attracts the eye as a somewhat significant event, but when it is explained by the marriages of two daughters, I think the weight of that evidence is greatly diminished, if not entirely neutralised; I find nothing in those events to shake the conclusion at which I

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have arrived. I therefore agree that the judgment of the learned Judge in the Court below was perfectly correct.

LOPES, L.J.:—

I entirely agree with the judgment of Lord Justice *Cotton*. I agree with the result at which Lord Justice *Fry* has arrived, but I do not reach it in the same manner.

The material question in this case is, what was the domicil of *Marc Thomegay* at the time of the birth in February, 1744, of *Sarah Thomegay*, who afterwards married *Delom?* If his domicil was English at the time of *Sarah's* birth, *à fortiori* he was so domiciled in this case at the time of his marriage with *Martha Powis* in 1755; and the decision of the learned Judge, therefore, in the Court below was right. I am clearly of opinion that when *Sarah Thomegay* was born in 1744, her father's domicil was English. The domicil of an independent person is constituted by the *factum* of residence in a country and the *animus manendi*, that is, the intention to reside in that country for an indefinite period. During the argument it was contended that the conduct and acts of *Marc Thomegay* subsequently to February, 1744, at the time of the birth of *Sarah* were inadmissible as evidence of *Marc Thomegay's* intention to permanently reside in this country at that time. It was said that we must not regard such conduct and acts in determining what the state of *Marc Thomegay's* mind was in February, 1744. For myself I do not hesitate to say I was surprised at such a contention; it is opposed to all the rules of evidence, and all the authorities with which I am acquainted. I have always understood the law to be, that in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency. The law, I thought, was so well-established on that subject that I should not have thought it necessary to allude to this contention, unless I had understood that the propriety of admitting this evidence was somewhat questioned by Lord Justice *Fry*, a view which I rather now gather from his judgment he has relinquished.

We have then *Marc Thomegay* residing continuously in this

country from 1734 to February, 1744, a period of ten years, and after 1744 to 1779, when he died in this country. Had there been no other evidence in this case, I should have thought this, in the absence of anything to the contrary, sufficient to raise an almost irresistible inference that in 1744 *Marc Thomegay* had an intention of making this country his permanent home, but we find him in 1744 living with an Englishwoman as his wife, and having children by her. In 1749 he marries an Englishwoman, and after her death in 1752 he marries in 1755 the woman with whom he had previously lived. During his residence in *England* from 1734 to 1779 (forty-five years), every act of his life is the act of a domiciled Englishman. His children are baptised in *England*, and most of them receive English Christian names. He is married in *England*, he carries on business in *England*, and so far as can be inferred from the evidence he never leaves *England* for forty-five years. Moreover, he makes his will in *England* in English, and in the English form, describing himself as of *Tottenham*, in the county of *Middlesex*, and by that will deals with property in *England*. Against this mass of evidence there is the petition of 1774, and the fact that in 1743 an Act of Parliament was passed naturalising several foreigners, and amongst them *Marc's* brother, but not *Marc*. Obviously the petition, according to my view, was presented in the interest of *Sarah Delom*, and the other illegitimate daughter; *Sarah Delom* marrying in 1768. Assuming this petition to be evidence (which I doubt) there is nothing in it to displace the evidence to which I have referred. The non-naturalisation of *Marc*, while it indicates a wish to preserve his nationality, in no way, in my opinion, disproves his English domicil. I think the learned Judge in the Court below, with such evidence before him, could not have found except in the way that he did.

COTTON, L.J.:—

The appeal will be dismissed with costs.

Solicitors: *F. A. Brabant; Ross & Douglas Norman; E. T. Hargraves.*

W. W. K.

C. A.
1888
KAY, J.
April 21;
May 5, 11;
June 4, 5, 23.
C. A.
Nov. 26, 27.

BROWN *v.* BURDETT.

[1875 B. 152.]

Practice—Costs—Taxation—Administration Action—Delay—Rules of Supreme Court, 1883, *Order* LXV., *r.* 11—*Costs out of Estate.*

The Court will not permit the costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of an estate under its care.

The amount of costs allowed by a Taxing Master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate.

An administration action, which was commenced in May, 1875, came on in November, 1887, upon second further consideration. The Judge finding that the costs would probably amount to nearly the whole value of the estate, and believing that there had been unreasonable delay in the conduct of the proceedings, directed the Taxing Master under Order LXV., rule 11, to inquire and report as to the delay and the costs occasioned thereby.

The Taxing Master reported that there had been great delay in the suit caused by the conduct of the solicitor for the Plaintiff, and disallowed considerable sums from the costs as between the various solicitors and their clients.

The Judge ordered that only a portion of the costs allowed by the Taxing Master to the several parties, including the costs of the Plaintiff, who was a trustee, should be paid out of the estate; and the Court of Appeal affirmed this decision.

THIS was a suit for the administration of the estate of *Anna Maria Burdett*, who died on the 16th of January, 1872.

On the 3rd of December in that year an action was brought in the Court of Probate to try the validity of the will. On the 5th of May, 1875, a compromise of that action was confirmed by the Court of Probate, which proceeded upon the basis that the costs of all parties should be paid out of the estate.

On the next day, the 6th of May, 1875, the bill in this suit was filed. The Plaintiff *T. Brown* was one of the executors; he was entitled to the personal estate, which was undisposed of, derivatively from the next of kin, and he was also entitled to an annuity of £10 charged on part of the real estate, and was devisee of another part of the real estate. The Defendants

were his co-executors, *Burdett* and *Baxter*. In 1876 *Burdett* died. The usual administration decree was made by Vice-Chancellor *Bacon* on the 21st of November, 1876. On the 8th of March, 1877, Mrs. *Thompson* and others, who were entitled to costs in the Probate action, and two of whom had legacies under the will of £10 each, and were also devisees of a small part of the real estate, obtained leave to attend the proceedings at their own expense. In November, 1879, Mr. *Penfold*, who took a small interest under the will, and had leave to attend, applied for conduct of the proceedings, but no order was made except that the Respondents' costs of the application were made costs in the action. On the 16th of June, 1882, the first general certificate was made, finding that £13 7*s.* 8*d.* was due to the Plaintiff on the personal estate account, and that £86 16*s.* was due from *Baxter* on the like account; that the debts amounted to over £400, the legacies to £153, and an annuity of £10 to the Plaintiff, and that there was practically little or no outstanding personal estate; but that £1607 was due from *Baxter* on account of the rents of the real estate, and there were findings as to the next of kin, and also as to the real estate and a mortgage thereon. On the 2nd of August, 1882, an order was made on further consideration, declaring, amongst other things, that certain parts of the real estate were charged with the payment of debts, funeral and testamentary expenses, and legacies, "together with the costs of this cause," in exoneration of the personal estate, and that the testatrix died intestate as to her personal estate. There was a direction for taxation of costs of all parties, but no order for payment, and certain directions as to sale of the real estate, and further consideration was adjourned.

In March, 1883, *Baxter* having become bankrupt, the suit was revived against *Roberts*, his trustee in bankruptcy. On the 28th of April, 1883, *Godfrey* and *Allen* were appointed new trustees in the place of *Baxter* and *Burdett*, and the costs of that appointment were ordered to be taxed, but there was no direction for payment. On the 30th of April, 1883, the suit was revived against the new trustees. On the 31st of May, 1883, by an order of that date, it was declared that the costs of certain persons who were parties to the Probate action, "and the costs of

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all parties of this action since the 2nd of August, 1882, including the costs of and relating to this application, are payable out of the testatrix's real estate in exoneration of her personalty," and there was a direction to the Taxing Master to tax the same, and liberty to apply for payment. On the 2nd of June, 1883, an order was made for sale of all the real estate. On the 19th of the same month there was a separate certificate that £4500, or thereabouts, would be wanted for testamentary expenses, debts, and costs, and on the 27th an order was made for payment of the personal estate to the Plaintiff. In April, 1884, *Penfold* again applied for the conduct, and it was refused, with costs. On the 28th of November, 1885, a sum of £600 was ordered to be paid to *Woodall*, the Plaintiff's solicitor, on account of costs. In February, 1887, *Woodall* died. On the 30th of July the second general certificate was made. During the progress of the suit the real estate was sold in lots, producing altogether £3450. The particulars of the sales are stated in the judgment of Mr. Justice *Kay*.

On the 4th of November and the 14th of December, 1887, the cause came before Mr. Justice *Kay* for further consideration. It was then found that the whole estate amounted to rather less than £4000, the whole of which it was anticipated would be swallowed up in costs. Under these circumstances Mr. Justice *Kay*, considering that there had been unreasonable delay in the conduct of the suit, made an order under Order LXV., rule 11, directing the Taxing Master to report to him who, whether parties or solicitors, were responsible for such delay, and the costs occasioned thereby, and directing that the solicitor for the Plaintiff should attend before the Taxing Master and shew cause.

An appeal was brought from this order, but the decision of Mr. Justice *Kay* was affirmed and the appeal dismissed (1).

It appeared from the Taxing Master's certificate and report that the amount of costs claimed by the different parties was about £5804. Of this sum £1767 was claimed as the costs of the Probate action, and £4037 as the costs of the Chancery suit. The Taxing Master disallowed £832 of the Probate costs, and £1470 of the Chancery costs, leaving £935 Probate costs

(1) 37 Ch. D. 207.

and £2567 Chancery costs, which he allowed as between the parties and their solicitors.

The Taxing Master reported that "There has been great delay on the part of the Plaintiff's late solicitor, Mr. *Woodall*, delay in Chambers, delay in prosecuting the suit generally, and, to my own knowledge, great delay as to the taxation;" and further, that "Mr. *Woodall* was absolutely incompetent to manage the suit; and during the time he was the Plaintiff's solicitor he was greatly to blame for the delay."

On the 21st of April, 1888, the cause came on again before Mr. Justice *Kay* for further consideration and on a summons by the Plaintiff to vary the Taxing Master's certificate.

Ince, Q.C., and *H. Terrell*, for the Plaintiff:—

The Plaintiff, as executor and beneficiary, ought to be allowed his taxed costs out of the estate. The will of the testatrix was one of great complexity (see the report of the case on first further consideration (1)); there were several questions to be determined, and under the practice then existing this suit was properly instituted, and some delay was inevitable. A general administration decree, directing usual accounts and inquiries, having been pronounced, it was the duty of the Plaintiff's solicitor to carry out that decree and prosecute the accounts and inquiries in due course. The system may have been an evil one, but while it existed it was the right and the duty of solicitors to act in accordance with it.

[KAY, J.:—You have to shew me that the costs were necessarily incurred and that the suit was of some good to some one. I should conceive that the estate might have been perfectly well wound up in one or two years, and that the whole costs ought not to have been more than £1000.]

The Plaintiff, as executor, had a right to have his accounts taken in Court, and is entitled to his costs of this administration suit, and the new Rules of Court have not affected his right: *White* v. *Jackson* (2); *Farrow* v. *Austin* (3); *In re McClellan* (4);

(1) 21 Ch. D. 667.
(2) 15 Beav. 191.
(3) 18 Ch. D. 58.
(4) 29 Ch. D. 495.

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Rules of Court, 1883, Order LXV., rule 1, rule 27, sub-rules 30, 37; he is entitled to the reasonable costs which have been allowed by the Taxing Master in pursuance of the orders made in the suit on the 2nd of August, 1882, and the 31st of May, 1883.

[KAY, J., referred to *Johnson* v. *Telford* (1).]

No doubt where a trustee has paid his own solicitor, the bill of costs may be moderated as between the trustee and beneficiaries: *Allen* v. *Jarvis* (2); here the Plaintiff is beneficiary as well as executor.

The costs of the Defendant *Roberts*, the trustee in bankruptcy of *Baxter*, ought not to be allowed, as *Baxter* when he became bankrupt was in default to the estate, having received rents and profits for which he had not accounted: *Carr* v. *Henderson* (3); *Massey* v. *Moss* (4); *Smith* v. *Dale* (5); *In re Basham* (6); *McEwan* v. *Crombie* (7); *In re Vowles* (8); 32 & 33 Vict. c. 71, s. 49; *In re Payne* (9).

The costs of the parties attending proceedings were unnecessary and ought not to be allowed: *Sharp* v. *Lush* (10); *Day* v. *Batty* (11).

H. H. Hood Barrs, the Plaintiff's solicitor, in person:—

I am not responsible for the delay, having only acted for the Plaintiff since the 11th of February, 1887, after the death of *Woodall*, the former solicitor. The delay was caused by the illness of *Woodall*. It was my right and duty to bring before the Taxing Master the grounds on which I thought costs ought to be allowed or disallowed: *Simmons* v. *Storer* (12); *Ross* v. *Ashwin* (13); Rules of Court, 1883, Order LXV., rule 27, sub-rule 23. The suit was necessary, because the executors had no power to sell under *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), see sect. 18. The costs after the hearing ought to be allowed no less than the previous costs: *Krehl* v. *Park* (14).

(1) 3 Russ. 477.
(2) Law Rep. 4 Ch. 616.
(3) 11 Beav. 415.
(4) 1 Hare, 319.
(5) 18 Ch. D. 516.
(6) 23 Ch. D. 195.
(7) 25 Ch. D. 175.
(8) 32 Ch. D. 243.
(9) 18 Q. B. D. 154.
(10) 10 Ch. D. 468.
(11) 21 Ch. D. 830.
(12) 14 Ch. D. 154.
(13) W. N. (1884), p. 86.
(14) Law Rep. 10 Ch. 334.

Marten, Q.C., and *Swinfen Eady*, for the Defendant *Roberts*, the trustee in bankruptcy of *Baxter* :—

Roberts is entitled to his costs out of the estate. As executor, *Baxter* fully accounted. *Roberts* was made a party solely in respect of the real estate devised to *Baxter* beneficially, and was a necessary party to the raising of the charge created by the testatrix, being the person interested in seeing that the amount of the debts, funeral and testamentary expenses, and legacies, was kept down. He was also a necessary party for the purpose of selling the real estate. The circumstance that *Baxter* did not account for rents and profits of the real estate is not material; other devisees have received rents and profits and have not accounted. The Taxing Master has reported that the solicitors of *Roberts* have assisted more than any one, and have not been guilty of any delay or default, and *In re Basham* (1) shews that where a bankrupt trustee or executor, after the bankruptcy, his debt remaining undischarged, renders services in an administration action, he is entitled to be paid his costs incurred subsequently to the bankruptcy: *Carr* v. *Henderson* (2), and *Massey* v. *Moss* (3), have no application; and the other cases cited favour our contention. *Roberts* was brought into the suit; the officer of the Court requested his assistance and he came in and gave it. The testatrix having substituted the real estate for the personalty as the property primarily subject to her debts, &c., the devisees ought to be in the same position as regards costs as residuary legatees in an ordinary case, who are undoubtedly entitled to their costs: *Weston* v. *Clowes* (4); *Wetenhall* v. *Dennis* (5); *Major* v. *Major* (6); *Morgan* and *Wurtzburg* on Costs (7).

Horton Smith, Q.C., and *R. F. Norton*, for the Defendants *Godfrey* and *Allen*, the new trustees:—

These trustees are entitled to their costs of suit out of the estate: *In re Ormston* (8). Part of the property was devised to the executors for a term of 200 years upon a trust which

(1) 23 Ch. D. 195.
(2) 11 Beav. 415.
(3) 1 Hare, 319.
(4) 15 Sim. 610.
(5) 33 Beav. 285.
(6) 2 Drew. 281.
(7) 2nd Ed., p. 201.
(8) 36 W. R. 216.

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Bacon, V.C., held to be bad (1); but although the beneficial interest was invalid, the legal term remained, and it was therefore proper to appoint new trustees of the will. Where part of an estate is given to a trustee he is entitled to his costs as against the whole estate: *In re McClellan* (2).

R. J. Parker, for *Penfold*.

Dibdin, for other persons having leave to attend proceedings.

Ince, in reply.

1888. June 23. KAY, J.:—

On the 4th of November, 1887, this action came on before me upon second further consideration. About eight counsel appeared for the various parties, and it was stated that minutes had been prepared which provided for the taxation and payment out of the estate of the costs, and that it was doubtful whether there would be more than sufficient to pay them. Upon inquiry, it appears that the estate consists of about £3000 in Court, and £600 which has been paid to the Plaintiff's solicitor on account of costs; and about £1700 which has been received as income by the Defendant *Baxter*, who was one of the executors and was entitled, as devisee, to a portion of the estate. *Baxter* is a bankrupt, and his estate will pay only a small dividend. No account has been given of the income of any other part of the estate. There was also a small personal estate. Speaking roughly, the estate may be altogether about £4000. It was startling to hear that all this would be wanted for costs. I turned at once to the pleadings, and found that the suit was commenced on the 6th of May, 1875, and although nothing seemed necessary except to realize the property and to administer the proceeds, it had dragged on from that time to the present. Delay means costs; and as it appeared to me that such an amount of costs as £4000 must have been improperly incurred, and that there must have been undue delay, it was the duty of the Court, under Order LXV., rule 11, to call upon the solicitors of the parties to shew cause why some portion of such costs should not be disallowed as between the solicitors and their

(1) 21 Ch. D. 667, 673. (2) 29 Ch. D. 495.

clients, and under the express provisions of that rule the matter was referred to a taxing officer for inquiry and report, and the solicitors were directed to attend, and have attended, before that taxing officer, whose report is now before me. Some of the parties, including the Plaintiff, appealed against this direction, but the appeal was dismissed with costs (1). The result of the Taxing Master's report is shortly this: The amount of costs claimed by the different parties was £5804. Of this sum £1767 was claimed as the costs of a Probate action, which was compromised the day before the bill in this suit was filed, leaving £4037, which were claimed as the costs of this suit alone, of which no less than £2030 were claimed on behalf of the Plaintiff.

The Taxing Master has disallowed £832 of the Probate costs and £1470 of the Chancery costs, leaving over £3500 costs which have been allowed as between the parties and their solicitors. The question is now to be determined by the Court how much of these costs ought to be paid out of the estate.

By the third codicil the testatrix declared that her debts (except a mortgage on part of *Gilmorton*), funeral and testamentary expenses and legacies should be chargeable upon and payable out of all her real estate in manner following: one-third upon one portion, one-third upon another, and one-third upon the rest.

Subject to this charge the real estate was specifically devised to various persons. There was no trust of any part of it except one, which I shall notice more particularly hereafter, which has failed.

The suit, therefore, is not to carry out any trust, but is an administration suit to raise debts and costs out of specifically devised real estate.

The personal estate was undisposed of, and has devolved upon the Plaintiff. It is of small amount.

The property so charged by the will has been sold in lots, and is subject to the charge in the following proportions: Lots 1 to 3 are subject to one-third of the charge, Lots 4 to 8, one-third, and Lots 10 and 11, the remaining one-third. They realised respectively £610, £760, and £2080. As the whole estate is charged,

(1) 37 Ch. D. 207.

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the deficiency of any portion to bear its one-third must be made good by the rest.

Lot 1 sold for £220. Subject to a term of twenty years, the trusts of which have been declared void, this property was devised to *Burdett*, since deceased, for life, remainder to *Baxter* in fee, and now belongs to the trustee in bankruptcy of *Baxter*.

Lots 2 and 3 sold for £390. They belonged to *R. Burdett*, deceased, for life, remainder to *M. A. Burdett* for life, remainder to *A. M. Burdett* in fee.

Lot 4, £290; *T. Worth*, now deceased, for life, remainder to *T. Worth*, jun., in fee.

Lot 5, £170; *T. Worth*, deceased, for life, remainder *Ann Worth* for life, remainder *Elizabeth Wilson* for life, remainder *A. M. Thompson* in fee.

Lot 6, £135; *T. Worth*, deceased, for life, remainder *Ann Worth* for life, remainder *T. Dowell* for life, remainder to Plaintiff *Brown* in fee.

Lot 7, £110; *T. Worth*, deceased, for life, remainder *Ann Worth* for life, remainder as to part to Plaintiff *Brown* in fee, and as to the rest to *Joseph Hunt* for life, remainder to *Sarah Hunt* for life, remainder to Plaintiff *Brown* in fee.

Lot 8, £55; *T. Worth*, deceased, for life, remainder to *Ann Worth* for life, remainder to *Thomas Garratt* for life, remainder to his wife for life, remainder to *Ruth Blockley*, *Clara Bray* and *William Garratt* in fee.

Lot 10, £2015; belongs to *Baxter's* trustee in bankruptcy.

Lot 11, £65; Plaintiff *Brown* in fee.

The total proceeds are £3450.

Lot 9 was mortgaged to its full value, and has been taken by the mortgagee. Lots 2 and 3 were subjected by the codicil to half a rent-charge of £10 a year to the Plaintiff during the joint lives of *Thomas Worth* and *Ann* his wife. Lots 4 to 8 to the other half. There is due to the Plaintiff on his accounts £61 2*s.* 8*d.* Funeral expenses unpaid, £16 4*s.* 6*d.*; debts with interest, about £500; legacies which do not carry interest, £153 6*s.*; total, about £730.

[His Lordship then shortly stated the proceedings in the suit as before mentioned, and continued:—]

When this suit was instituted in 1875 none of the executors had received any part of the estate. The real estate which was charged with debts by the will they had power to sell, and under *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), s. 16, they could have conveyed the legal estate, though it was not vested in them, except such part as was devised to *Baxter* in fee, which, of course, he could have conveyed. The Probate costs were payable, and it was obvious that some sale would be necessary to raise them, and the debts, funeral expenses, legacies, and costs of administration. But this might have been done without coming to the Court.

However, there were certain questions of construction to be determined, and according to the practice which existed in 1875 it was not improper to administer the estate in Chancery. The practice was an evil one. It has been constantly abused in a manner of which this suit is an illustration.

Dealing first of all with the Plaintiff's costs, these are taxed as between the Plaintiff and his solicitors at the sum of £1307 17*s.* 11*d.* I have now to consider how much of these costs ought to be paid out of the estate.

In December, 1882, *Baxter*, one of the executors, absconded, and was made bankrupt, and it then became impossible to exercise the executors' power of sale under 22 & 23 Vict. c. 35, s. 16, and the new trustees appointed in April, 1883, not being executors, would not have any such power. In the interpretation clause of the *Trustee Act*, 1850, it is provided that the words "trust" and "trustee" shall extend to and include the duties incident to the office of personal representatives of a deceased person, but the order appointing these new trustees does not profess to appoint them to perform these duties. It would be doubtful if it had done so whether this would have given them and the other executor (the Plaintiff) this statutory power, and that view has been taken in preparing the conveyances in this case.

It was suggested that the Plaintiff's costs as taxed ought to be allowed against the estate, and that the taxation should be taken as conclusive on that point. But on being pressed with the consequences of such a rule counsel very fairly admitted that it could not be maintained in all cases. Costs which a

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trustee may be bound to pay to his own solicitor might be very improper costs as against the trust estate. Suppose a trustee, having little or no interest in the estate, were to allow a solicitor to use his name as plaintiff in an administration action, and were to encourage or permit him to carry it on in an unusually costly manner, although he might be liable for all such costs to the solicitor so employed, it would be impossible to maintain that the Court would be bound to permit such costs to be paid even out of a trust estate from which the trustee was entitled to the usual indemnity. The rule is thus stated in *Lewin* on Trusts (1): "A trustee will have no claim to reimbursement out of the trust fund where the legal proceedings were occasioned by his own negligence in the first instance; or were improperly instituted by himself; and a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solicitor, for the bill, as between trustee and *cestui que trust*, though not submitted to a regular taxation (which is between solicitor and client) will be moderated by the Court by a deduction of such charges as may appear irregular and excessive."

I think this is an accurate statement of the practice, and that the rule applies to costs occasioned by the improper conduct of a suit. In *Johnson* v. *Telford* (2) Sir *John Leach* on this ground refused to allow against the estate costs which trustees and executors had actually paid to their solicitor, and which he considered excessive. The same thing was done by the Court of Appeal in *Allen* v. *Jarvis* (3), where it was held that under the Consolidated Order 40, rule 25, the Judge had a right to require the assistance of the Taxing Master to determine how much of such a bill which was no longer taxable should be allowed out of the estate.

In *In re Brown* (4) Lord *Romilly*, who had much experience in cases of taxation, affirmed and acted upon the same principle.

The Court has always had and exercised the power of making executors personally liable for the costs of useless and improper litigation even in an administration suit: *Lowson* v. *Copeland* (5).

The Taxing Master in an ordinary taxation only determines

(1) 8th Ed., p. 636.
(2) 3 Russ. 477.
(3) Law Rep. 4 Ch. 616.
(4) Ibid. 4 Eq. 464.
(5) 2 Bro. C. C. 156.

what costs are properly payable by the client to his own solicitor. It is the duty of the Court to consider and determine how much of such costs should be paid out of the estate.

I am very much indebted to the Taxing Master to whom this case has been referred for the care and pains he has taken with it. After the taxation was completed, and he had the full knowledge which his elaborate investigation of the costs had given him, I asked him to consider what was the amount which if the Plaintiff had properly conducted this suit would have been incurred in costs. He took the papers again, and after giving the matter full consideration, he informed me that everything which has been done in the suit, if it had been properly conducted, would be amply compensated by £800 costs to the solicitor employed by the Plaintiff down to February, 1887, when *Woodall*, the Plaintiff's first solicitor, died. The Taxing Master then was so good as to come and see me, and I talked the matter over with him carefully, and he repeated and confirmed the opinion he had given me as I have mentioned.

I therefore consider it to be the duty of the Court not to allow to the Plaintiff out of this estate more than £800 for *Woodall's* costs. He has received £600, which leaves only £200 payable in respect of these.

The costs allowed to the Plaintiff's solicitor who has succeeded *Woodall* are taxed at £141 17*s.* 1*d.* Adding these to the £200 the amount payable out of the estate for these costs is £341 17*s.* 1*d.*

I am sorry to learn that the practice in the taxing office is to allow the costs of taxation as between a solicitor and his client, although more than one-sixth is taxed off, in all cases except those falling under the *Solicitors Act*, and that such costs have been allowed in this case. There is nothing to discourage solicitors from carrying in exorbitant bills of costs. The practice seems to me to require amendment. It ought to be the same as that under the *Solicitors Act.*

In every instance in this taxation the bills have been reduced more than one-sixth, in some as much as one-half.

The next case I will deal with is that of the trustees appointed by the Court in place of *Burdett*, deceased, and *Baxter*, bankrupt, by the order of the 28th of April, 1883.

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Only one part of the property was given in trust. That was the dwelling-house, Lot 1, which was devised to the executors for twenty years upon an absurd trust to shut up the house, which the Court by the order on first further consideration, dated the 2nd of August, 1882, declared to be void (1). Subject to that trust the property was devised direct to *Burdett* for life, remainder to *Baxter* in fee. *Burdett* having died, the effect of the declaration was that the property belonged to *Baxter* in fee, and the twenty years' term, if it had any existence, was simply a dry legal term. But, in my opinion, it had no existence, but was a satisfied term which ceased under the provisions of 8 & 9 Vict. c. 112, s. 2. *Baxter* was a party, and had a solicitor on the record. An order for sale might have been made against him, and if his concurrence in the sale in respect of the twenty years' term in this house were necessary, a vesting order could have been obtained under the *Trustee Extension Act* at very little expense. To appoint new trustees under the circumstances was a farce, and it has proved a most expensive farce, for I see with great regret that the solicitor for these gentlemen brought in a claim before the Taxing Master for no less than £624 17*s.* 6*d.* for their costs. More than one-third of this was taxed off, but the amount allowed between them and their solicitor is £395 17*s.* 4*d.* *Baxter* is still a party to the suit as executor. His interest beneficially is represented by his trustee in bankruptcy, who is also a party. These new trustees, even if they had any estate, which, as I have said, they had not, should have recognised that the utmost that could be required of them was to concur in the conveyance of the one house in which the term of twenty years had been created, and it was not proper conduct on their part to incur costs in the manner they have done. Looking at the order appointing the trustees I find that the parties in whose presence it was made were *Martha Ann Burdett*, spinster, *Ann Worth*, widow, *Mary Dowell*, widow, *Thomas Dowell*, and *John Wilson*, persons who had leave to attend, and *Thomas Baxter* and *Roberts*, his trustee in bankruptcy. None of these persons, except the last two, had any interest in Lot 1. *Roberts*, who was interested, seems to have concurred in the appointment. I must therefore, though with

(1) 21 Ch. D. 667.

great reluctance, order the £220 which this estate produced to be paid to these so-called trustees. I make no other order as to their costs.

Then as to the trustee in bankruptcy of *Baxter*. He represents the estate which was devised to *Baxter* beneficially, and has been brought before the Court in that character only. His solicitors brought in a bill for £519 16*s.* 2*d.* £156 6*s.* 8*d.*, or nearly one-third, was taxed off, leaving with fees of taxation £372 11*s.* 2*d.* due. I think these costs may be allowed out of the bankrupt's estate, because, although *Baxter's* interest in the matter was only that of a devisee subject to debts and costs, the Taxing Master reports that the solicitors of the trustee in bankruptcy assisted more than any one, and were not guilty of any delay or default, but I cannot allow them costs in this suit, except out of any money that may be coming to *Baxter's* trustee in bankruptcy.

The other costs are those of certain persons who obtained leave to attend at their own expense, their principal interest being that they were entitled to some of the costs in the Probate action, and some of the persons appearing by the same solicitor had an interest under the will.

These costs were brought in at £750 15*s.* £296 8*s.* 6*d.* were taxed off, leaving with fees £465 15*s.* 4*d.* due. I see no ground whatever for allowing these costs out of the estate.

There remains the case of Dr. *Penfold*. He was a legatee of £19, and under the terms of a forfeiture clause in the void trust, he might possibly, if that trust had been valid, have acquired other interests under the will. He obtained leave to attend on the 6th of March, 1877. He deserves credit for having made two attempts to obtain the conduct of the suit. I am ready to believe that he did so for the purpose of putting an end to the shameful delay and mismanagement which have characterized the proceedings. Both applications failed, one being refused without, the other with, costs; I suppose owing to the small amount of his interest, which, after the decision as to the invalidity of the trust, was only the £19 legacy. His costs were moderate, £111 19*s.* 4*d.*; taxed off £25 6*s.* 4*d.*; allowed with fees £88 15*s.* I must decline to allow them out of the estate.

Then I have to deal with the costs of a summons for conduct of

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the taxation taken out by the Plaintiff. On the 25th of October, 1887, I ordered the costs of an adjournment before me of that summons in Chambers to be paid by the Plaintiff. I make no other order as to the costs of this summons.

As to the Plaintiff's summons to review the taxation of his costs, I have been unable to alter the certificate of the Taxing Master, and that summons must be refused with costs.

It seems to me that the inquiry which I directed before the Taxing Master has resulted in shewing that claims for costs were being made against the estate which were either altogether improper, or were so to a very large extent, and I am not inclined to give any one costs of that inquiry.

Then come the costs of the further consideration. In my opinion very great injustice would have been done if I had acceded to the request made to me on all sides to expend what is left of this estate in payment of costs. The Plaintiff, who has the conduct of this suit, should have been anxious to protect the estate. He has shewn no such anxiety. The conduct of the action throughout has been improper, and it is not using too strong a term to say that the delay and amount of costs incurred are scandalous. No one made the slightest attempt when the case came on before me on the 4th of November, 1887, to protect the estate in any way, and I must mark my sense of the conduct of the several parties by refusing to give any costs to any one since the taxation.

I do not think I can refuse to allow the Probate costs out of the estate. The real estate was represented in that action, and its effect was to establish the will both as to real and personal estate. The compromise was upon the terms that the costs of all parties to that action should be paid out of the estate, and I do not see how any one claiming under the will can resist that.

These costs amount altogether to £1073 12*s.* 4*d.* According to the ordinary rule they would, against the estate, be payable subsequently to the costs of administration: *In re Mayhew* (1); *Major* v. *Major*. (2)

With respect to the fund in Court the order will be: Sell the stock. Out of the proceeds pay for the Plaintiff's costs £200 to

(1) 5 Ch. D. 596. (2) 2 Drew. 281.

the representatives of *Woodall*, and £141 17*s.* 1*d.* to the Plaintiff's present solicitor; £220 to the solicitors of the new trustees for their costs; £10 10*s.* to Messrs. *Meredith*, solicitors of *Ann Maria Burdett*, spinster, for their costs mentioned in the Taxing Master's certificate; £22 7*s.* to *Henry Green*, also there mentioned; £874 19*s.* 6*d.* to the solicitors of *Ann Maria Thompson*, widow, *Mary Dowell*, and *Thomas Dowell*, and *John Wilson*, defendants in the Probate action, for their costs in that action; £198 12*s.* 10*d.* to the representatives of *Woodall*, for the Plaintiff's costs in the Probate action; £13 7*s.* 8*d.*, £19, and £28 15*s.*, making together £61 2*s.* 8*d.*, found due to the Plaintiff on his accounts. £16 4*s.* 6*d.* funeral expenses unpaid. The testator's debts found, with subsequent interest to the date of this order, the amount to be calculated and put in the order; £153 of legacies to the several legatees without interest.

The £220 is the proceeds of Lot 1, leaving £390 only the proceeds of Lots 2 and 3 to answer one-third of the outgoings, which those three lots were primarily to bear. One-half of the balance of those outgoings will more than exhaust the proceeds of Lots 4 to 8, which were to bear another one-third. The balance is payable out of Lots 10 and 11, leaving practically only a portion of the proceeds of Lot 10 unexhausted.

This belongs to *Baxter's* trustee in bankruptcy, subject to the payment of his taxed costs in this suit. It is not subject to the rent-charge of £10 given to the Plaintiff during the joint lives of *Thomas Worth* and *Ann*, his wife, because the third codicil expressly exonerated this part of the estate from that rent-charge, which consequently fails.

The rents received by *Baxter* will not be required, and no dividend is to be paid in respect of these. If any has been paid, it must be repaid.

Out of what may remain of the proceeds of the fund in Court, pay £372 11*s.* 2*d.* to the solicitors of *Baxter's* trustee in bankruptcy, and the residue, if any, to him.

I am informed that £86 16*s.*, found due from *Baxter* on the personal estate account, has been paid to the Plaintiff by *Baxter*.

The only result in this case of this close investigation of all the facts and circumstances is that the estate is enabled to pay

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the debts and legacies which ought to have been paid fifteen years ago. The costs which I have allowed will nearly, if not quite, exhaust what is left. But the time and trouble which have been given to this case will not be in vain if these two points are established, and brought to the attention of the profession and suitors: 1. The Court will not permit the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be paid out of an estate under its care. 2. The amount of costs allowed by a Taxing Master, as between the client and his solicitor, is not conclusive of the amount which the Court will allow out of the estate.

I have been in communication with one of the Registrars, who was in Court when this case was heard, and he will draw up this order, under my directions, without further expense to any one.

C. C. M. D.

From this order the Plaintiff appealed.

The appeal came on to be heard on the 26th of November, 1888.

Sir *Horace Davey*, Q.C., and *H. Terrell*, for the Appellant.

Swinfen Eady, for the trustee in bankruptcy of *T. Baxter*.

COTTON, L.J. (after disposing of some objections to the Taxing Master's certificate, which do not require a report, continued):—

There was another matter which I must also dispose of. Mr. *Baxter's* trustee in bankruptcy is really now entitled to the great bulk of what remains of this estate, and it was contended by the Plaintiff that there ought to have been an apportionment, as between what comes to the Plaintiff and what goes to the trustee in bankruptcy, of the amount which the Court directed to be raised out of the estate. The sum is a very small one, and the contention is not really disputed, but that does not make any difference as regards the real question, or the costs of raising the question.

Then we come, disposing of these minor points, to the appeal against the decree on further consideration, and the main point

is as regards the direction made by the learned Judge to allow the Plaintiff's solicitors, down to a certain date, only a certain amount of costs, being less than the amount at which his costs had been taxed by the Taxing Master.

Now this action is certainly remarkable—it is remarkable in the circumstances of its commencement, but more remarkable in the great delay which there must have been in the conduct of this action; and in the enormous expense as compared with the estate which was to be administered. There had been a litigation in the Probate Court as to the will of the testatrix. That litigation was settled by a compromise; and it appeared that during that litigation Mr. *Brown*, the present Plaintiff, was severed from the Defendants, who were his co-trustees, they conducting, at last alone, the action to have the will admitted to probate, he not taking part as Plaintiff. It is said that he sided with those who opposed the will. That I do not rely upon; but, at any rate, he did not carry the action to an end, and immediately after the will was admitted to probate. A day or two afterwards, on the 6th of May, 1875, he instituted this action, and the Defendants were his two co-trustees. I call them co-trustees as shortly expressing their position. Then there was a great quantity of proceedings in the action which were not brought to a close until the year 1888. That was an enormous length of time, having regard to this, that what was to be done was to ascertain what debts there were, what legacies there were — there were very few—to have one point decided as to what is called the "blockade clause"—whether that was a valid trust or not, or whether it was void—and then to raise the debts and legacies, and costs out of the estate.

The testatrix had left her real estate, most of it specifically, dividing it into various portions, and she had thrown on the real estate, in exoneration of the personal estate (which was very small, I think some £80 or £100), the costs which she directed to be raised, and all the legacies and debts. It certainly was a very long time to take in dealing with the question, and it has come to this, that when that question is settled, when the debts and legacies are paid, and when the costs are provided for, there is something under £300 which remains of this estate—

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the estate, I think, being something like £4000. That is a result not very creditable to the Chancery Division, not creditable to the way in which it deals with the estates administered under its directions; and when the case came before Mr. Justice *Kay*, he first of all directed that there should be an inquiry under Rule 11 of Order LXV. That rule is this:—"If in any case it shall appear to the Court or a Judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or Judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client," and also, if the circumstances of the case require, that the solicitor may be ordered to refund. Mr. Justice *Kay* directed an inquiry under that order, and there was an appeal to us, and we thought that the Judge was right, and that in a case like this he might direct that inquiry.

Now I will call attention to this point, that what is done under that rule is not taxation. It is only to see whether the costs, although properly incurred, have been fruitless to the person incurring the same, and possibly it was rather unfortunate that the course which has been ultimately taken was not taken at an earlier stage. But in my opinion what the Judge did, and what we did in affirming his decision, was done with the view of enabling the Court to decide whether there had or had not been improper conduct in the carrying on of this action. When the taxation of the costs, which had been ordered independently of the reference under that order, was completed, it appeared that the costs had been exceedingly large, and that a very large sum had been taxed off by the Taxing Master. The Plaintiff's costs in the Probate Court, which had to be dealt with, were £313. Of these £119 were taxed off, and what remained after taxation was £194. Then the Plaintiff's costs in the Chancery action, included in the bill of Mr. *Woodall*, the late solicitor, came to £1716, and there were taxed off £577. That left £1139 as the costs of the Plaintiff's solicitor, Mr. *Woodall*, who only acted

during a portion of the time, because he died; and there were other very large costs of the different parties in the action.

Then that came before the Court with a report of the Taxing Master that there had been very great delay, and he said that Mr. *Woodall* had been guilty of very great delay: "There has been great delay on the part of the Plaintiff's late solicitor, Mr. *Woodall*, delay in Chambers, delay in prosecuting the suit generally, and to my own knowledge great delay as to the taxation." And he also certified that "Mr. *Woodall* was absolutely incompetent to manage the suit, as during the whole time he was the Plaintiff's solicitor he was greatly to blame for the delay."

When the case came before Mr. Justice *Kay* he took this course, against which great objection has been raised. He inquired of the Taxing Master what in his opinion would be the costs which would have properly remunerated the Plaintiff's solicitors if the action had been properly conducted. The Taxing Master said that £800 would have been ample, and then all that he allowed the Plaintiff's solicitor *Woodall*, the late solicitor, who already had received £600 on account, was £200, to make up the £800. The Judge was satisfied that, in the words of the 1st rule of Order LXV., there had been unreasonableness in carrying on this action, that is to say, that the action had not been carried on in a reasonable way, both as regards delay and the expense which had been incurred, not only by the delay, but in other matters. And I may mention that if there is great and unreasonable delay in the conduct of an action it is not only the costs actually incurred by any proceedings as regards which the Taxing Master might say this ought to be disallowed because it is unreasonable, but there may be great loss and great injury to the parties by the very fact of that delay, which will not be sufficiently compensated by merely disallowing to the solicitor certain things on which a finger can be put, and saying, "Now here was an unreasonable delay, and this must be struck out." That being so, as the Order provides that nothing is to deprive the trustee of his right to costs when he has not unreasonably instituted or carried on any proceedings, the learned Judge came to the conclusion, from the facts which were before him and the length of the litigation, and the cost of

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it, and the Taxing Master's certificate, and the report which he made under rule 11, that here the Plaintiff, whom he treats as a trustee—and I do not go into the question whether he should be called so or not—has lost his right to costs. He does not say, and perhaps it would have been wrong if he had said, that there was no necessity for any action, because there was this question as to the "blockade trust," as it was called, which was declared to be bad, and there might have been other difficulties in the administration of the estate. He does not say it ought not to have been instituted, but that it was unreasonably carried on, and I cannot see any ground for differing from him in that view on the facts which are before us.

Then he consulted the Taxing Master, not referring the question to him, but consulting him. If he consulted him on any question really still in dispute between the parties I should have thought that if the Plaintiff desired it he ought to have had an opportunity of attending before the Taxing Master and meeting the charges which were made against him, and if the decision of the Judge turned on this, that certain particular costs ought to be disallowed, that certain proceedings of which the Taxing Master had allowed the costs ought to be disallowed, probably that argument might have prevailed. The learned Judge says: "The Plaintiff has lost his right to costs. I will not altogether, as I might do, deprive him of all costs of this action, because it may be said that an action might be properly instituted, but he has carried it on most improperly and unreasonably, and he has so forfeited his right to costs. I will, therefore, give him such costs as I think might have reasonably been incurred by his solicitor if the action had been reasonably conducted."

Now, the Taxing Master, being an officer of the Court, who constantly sees these actions, and what the questions in them are when they are properly conducted, was the very best person for the Judge to consult. He would know better than we should what would be the costs of an action reasonably conducted, and the solicitor of the Plaintiff has had an opportunity of laying before the Taxing Master on the inquiry under rule 11 any statement of facts which he desired to bring before him in reference to the report which was to be made. So that, in my opinion, there was

no injustice, no wrong in any way suffered by the Plaintiff in the Taxing Master being consulted as he was. I think Mr. Justice *Kay* was right in the conclusion to which he came that the Plaintiff had lost his right to costs. He was merciful to him in not depriving him of all costs, but in giving him such costs as he, after having the best opinion he could get on the subject, thought would properly pay the solicitor his costs if the action had been reasonably conducted.

It was said that the Judge struck off a sum from the amount of costs as already taxed by the Taxing Master, and that this was introducing a new practice of the Judge taxing over again a bill already taxed by the proper officer of the Court. But, in my opinion, that was not so. That was not the principle of his decision. It proceeded on a different line, namely, what ought he in reason to allow this Plaintiff as against the estate when in his opinion he has lost his right to costs.

There was another objection raised that he struck this sum off from the amount of the bill as taxed when that included the costs, charges, and expenses which would not come within the principle of the Judge's decision. But when Mr. *Terrell* was pressed to say what costs, charges, and expenses there were, it seemed that the only one was the double probate, that is to say, the cost of taking out the probate by the Plaintiff after he had not joined in the probate by the other two executors, but that was not included in the Chancery bill from which the Judge made this deduction, but was included in the costs of the Probate action which took place before the costs relating to the Chancery proceedings were incurred. Therefore, in my opinion, we ought not on this point to make any difference in the judgment on further consideration. The judgment will be varied by making the apportionment I have mentioned, but that will not affect the costs of the appeal. The appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion on the principal appeal. With respect to some of the minor points, they were practically disposed of in the argument. Those are matters, in my judgment, entirely for the discretion of the Taxing Master, and an appeal

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from such a matter as that we cannot entertain. He is much more competent to deal with it than we are.

But the main question is quite another matter, and I must say that I am sorry to see a case like this brought here or brought anywhere else. It is one of those cases which brings the whole administration of the law in the Chancery Division into discredit. It is a scandalous case; nothing more nor less, and Mr. Justice *Kay* has done his best to grapple with it. Under the orders of the Court a direction was made to the Taxing Master to inquire how it came about that this action, which was comparatively simple, took such an inordinate time, and how it came about that it cost such a terrible amount of money, having regard to the estate, and the Taxing Master reported that there was scandalous delay and negligent and improper conduct, and that the costs and time consumed were attributable to those causes.

Then Mr. Justice *Kay* said: "If that is the case, I will see if I cannot at all events prevent the costs which have been so occasioned from coming out of the estate." He looked into it, and coming to that conclusion, as he had a perfect right to do, from the report of the Taxing Master, which was not made behind the backs of the parties at all, but in answer to his directions, he came to the conclusion that the Plaintiff had so conducted his case as to have disentitled himself to the protection and benefit of the ordinary rule as to costs.

Now I wish particularly to observe that Mr. Justice *Kay* did not, nor do we, in any way run counter to any previous order made in this case. There is no order for payment of costs that is in any way disturbed or affected. We do nothing of the kind. Whether we could or could not, it is not necessary for us to consider. There is no such order. The whole thing was open as to what ought to be done, and Mr. Justice *Kay* has come to this conclusion. He says, "This Plaintiff has so conducted himself, that he is not entitled to the ordinary costs that trustees and executors have, but a certain amount of useful work has been done. I will not go so far as to give him no costs, but I have ascertained what is a fair and reasonable sum in such a suit as this; and I give him that." And Mr. Justice *Kay* has given him £800, £600 of which had been already paid on account, and Mr. Justice

Kay gave him £200 more as a liberal compensation in his judgment.

Now the principle of his decision is summed up in the important rules which Mr. Justice *Kay* laid down, and which are to be found at the end of his judgment, and they appear to me to be right, and I wish to emphasise them here by reading them again. He says: "This case will not be in vain if two points are established and brought to the attention of the profession and suitors: first, that the Court will not permit the costs occasioned by the improper litigation or by the negligent conduct of administration proceedings to be paid out of the estate under its care; secondly, the amount of costs certified by the Taxing Master, as between the client and his solicitor, is not conclusive of the amount which the Court will allow out of the estate." I thoroughly concur in the whole of those remarks, that it does not follow that because the Taxing Master has taxed costs under certain orders the Judge is bound to allow those costs fully, though so taxed, out of the estate. As I have said, we are not disturbing any previous order. But having regard to the scandalous manner in which this case has been conducted, I think more than justice has been done to the Appellant.

BOWEN, L.J.:—

I am of the same opinion. This is a scandalous case. It shews that abuses have not yet been driven out of the administration of justice, and that great delay and inexcusable waste may take place in the administration in this Court of the estates of dead persons.

Here is a small estate which has been the subject of this suit for thirteen years, and at the end of the thirteen years most of the estate is wasted in litigation. Almost all the oyster has been eaten, and the shells remain. I am glad that Mr. Justice *Kay* came down with a heavy hand, not too heavy, on those who are responsible for such a monstrous abuse. I agree entirely with the view of my Brothers. This was a case in which, if Mr. Justice *Kay* had refused all costs whatever, I should not have said that he was doing more than was necessarily just. It does not follow that because some result is obtained in an administration suit as

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the result of the suit, that there may not have been such gross and profligate delay in the conduct of it, such useless proceedings taken, such time wasted, as to more than destroy the benefit of the suit itself, and I think Mr. Justice *Kay* had it within his power, if he had chosen, to refuse any costs whatsoever in the suit. But he did not do that. He turned to the Taxing Master, who is an expert, and said, "Supposing this suit had been reasonably conducted, what would have been the costs?" The Taxing Master told him. He has allowed those costs, and no more. I think he has taken not too merciful a view, but a fair view between the parties as to what should be done. If there has been a departure on his side from strict justice, I think of the two he has been too lenient. I quite agree with what has been said.

Solicitors: *H. H. Barrs*; *Field, Roscoe, & Co.*; *C. T. Foster*; *Clarke & Calkin*.

M. W.

C. A. 1888 *Nov.* 27, 29, 30; *Dec.* 5.

BIRMINGHAM AND DISTRICT LAND COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1886 B. 571.]

Railway Company—Disputed Interest—Declaration of Title of Landowner—Jurisdiction of High Court.

A., in occupation of land under a building agreement determinable if the buildings were not completed by the 30th of November, 1885, was informed in 1880 of the promotion of a bill for a railway which would affect the land. *A.* thereupon had an interview with his landlord's agent, who told him to suspend building operations till the result of the railway scheme was known — no express agreement to extend the time for building being come to. In 1883, the company obtained their Act, and on the 31st of July, 1883, purchased from the landlord such part of the land as was required; the purchase being made expressly subject to the building agreement. On the 16th of September, 1884, the company gave *A.* notice to treat. *A.* sent in no claim, and in January, 1886, the company took possession without making a deposit or giving a bond, as required by the *Lands Clauses Act*, insisting that *A.* had no interest in the land. *A.* thereupon commenced his action for an injunction, and to have it declared

that the building agreement was subsisting and that he was entitled to have his interest assessed on that footing :—

Held (affirming the decision of *Kekewich*, J. (1)), that as the company had, without complying with the provisions of the *Lands Clauses Act*, entered upon land of which *A.* was lawfully in occupation, he had ground for an action, and that, the action being brought to trial, the Court had jurisdiction to make a declaration as to his interest in the property; and that, although the term named in the agreement had expired, he had an interest in the land, for that the agent's direction to suspend building raised an equity against the landlord to prevent his ejecting *A.* at the end of the term until he had a reasonable time after notice to complete the building, and that the railway company took subject to that liability.

BY a building agreement dated the 5th of February, 1877, between a Mr. *Boulton* of the one part and the Plaintiff company of the other part, it was agreed that during ten years from the 30th of November, 1875, the Plaintiff company might enter upon a plot of land of 8½ acres therein described for the purpose of building. The Plaintiff company were to fence the land, and were to build within the ten years a certain number of houses of a specified description. Provision was made for granting separate leases of the houses as they were completed. In case of default by the Plaintiff company the lessor was authorized to vacate the agreement, and to re-enter upon all parts of the land of which leases should not have been granted.

Another agreement of the 5th of April, 1877, was entered into between the same parties, as to a plot of 3½ acres forming part of the same estate. This agreement was similar to the other, except that the term was only six years from the 30th of November, 1875.

By a third agreement, dated the 27th of October, 1879, some modifications were made in the two former agreements as to the class of houses to be erected under them.

The Plaintiff company entered upon and fenced the lands, and kept a man in occupation. They built a number of houses and obtained leases of many of them.

Not long after the date of these agreements, it became publicly known that the *London and North Western Railway Company* intended to apply for an Act authorizing them to make a line

(1) 36 Ch. D. 650.

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BIRMINGHAM AND DISTRICT LAND COMPANY v. LONDON AND NORTH WESTERN RAILWAY CO.

which would interfere with this property. The agent of the Plaintiff company had interviews with Mr. *Boulton's* agent, and represented that they could not safely go on building while this railway scheme was hanging over them, for that if this railway was made a different class of houses would be required. It was not distinctly shewn when these interviews took place, but the Court considered the evidence to shew that they took place not later than 1880, and that Mr. *Boulton's* agent told the Plaintiff company to stop building until it was seen what became of the railway scheme.

In 1883, the railway company obtained their Act, which enabled them to take a part of both those parcels of land, and on the 31st of July, 1883, they bought from Mr. *Boulton* a strip running through both parcels. This purchase was made with express notice of and subject to the agreements of the 5th of February and the 5th of April, 1877.

On the 16th of September, 1884, the railway company gave the Plaintiff company notice to treat for the above strip. The Plaintiff company sent in no claim, and no further step was taken under the notice.

On the 4th of January, 1886, the railway company entered upon and took possession of the strip of land without complying with the provisions of sect. 85 of the *Lands Clauses Consolidation Act*, considering that the building agreements were at an end by effluxion of time. The Plaintiff company thereupon commenced this action, asking a declaration that as between the two companies the building agreements were subsisting, and that the price and compensation payable to the Plaintiff company in respect of the land taken by the railway company which was comprised in the building agreements, ought to be assessed on the footing that the agreements were subsisting; and asking an injunction to restrain the railway company from taking possession of the land until they had complied with the provisions of the *Lands Clauses Act*.

The action was tried by Mr. Justice *Kekewich* (1), who decided in favour of the Plaintiff company. He did not grant an injunction, as the railway company had in the meantime given a

(1) 36 Ch. D. 650.

bond which the Plaintiff company were willing to accept as sufficient. The material part of the judgment was as follows:—

"Declare that as between the Plaintiff company and the Defendant company the agreements dated respectively the 5th of February, 1877, and the 5th of April, 1877, in the pleadings mentioned, so far as the same related to the lands purchased by the Defendant company, are subsisting, and that the price or value of the interest of the Plaintiff company in the said lands, and the compensation and damages for severance or otherwise payable to the Plaintiff company in respect of so much of the lands respectively comprised in the said agreements as have been or shall be taken by the Defendant company, ought to be assessed on the footing that the said agreements are still subsisting. And it is ordered that the bond entered into by the Defendant company, dated the 7th of September, 1886, is to be treated as having been given in compliance with sect. 85 of the *Lands Clauses Consolidation Act*, 1845."

The Defendant company appealed from this judgment.

Ince, Q.C., *Greene*, Q.C., and *Clare*, for the Appellants:—

The Court ought not to make any declaration in this action as to the Plaintiffs' interest, or investigate their title. The proper course for the Plaintiffs to pursue is to make a claim under the *Lands Clauses Act*, and to have the compensation assessed by an arbitrator or a jury, and then to bring an action on the award in which the question of title would be tried. The Defendants have now given a bond to the Plaintiffs in accordance with the *Lands Clauses Act*, and that being done, the Plaintiffs have no further cause of action in this Court. When the bond was given they ought to have discontinued the action: *Brierley Hill Local Board* v. *Pearsall* (1); *Doe* v. *North Staffordshire Railway Company* (2); *Adams* v. *London and Blackwall Railway Company* (3); *London and Blackwall Railway Company* v. *Cross* (4); *Reg.* v. *London and North Western Railway Company* (5). The *Judica-*

(1) 9 App. Cas. 595.
(2) 16 Q. B. 526.
(3) 2 Mac. & G. 118.
(4) 31 Ch. D. 354, 373.
(5) 3 E. & B. 443.

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ture Act, 1873, s. 24, sub-s. 7, does not help the Plaintiffs. It does not entitle them to tack on an irrelevant claim to their claim for an injunction. The whole proceedings before this action was commenced, were carried on under the *Lands Clauses Act*. We entered on the land under our purchase of the reversion, the building agreements having expired. Nothing took place between Mr. *Boulton's* agent and the Plaintiff company which could constitute a new agreement extending the time for building.

[LINDLEY, L.J.:—Did not what took place create an equity against Mr. *Boulton* having a similar effect: *Hughes* v. *Metropolitan Railway Company* (1).]

That equity only arises in cases of forfeiture.

Romer, Q.C., *Warmington*, Q.C., *Woodroffe*, and *Alfred Young*, for the Plaintiffs:—

The railway company contends that as no definite period of extension was named there was no effectual extension of the time for building. But we prove that *Boulton* requested us by his agent to stop building, and, after that, he could not have insisted that the agreements came to an end at the expiration of the original periods, but must have allowed a reasonable time for building. We were bound by the agreements to fence the plots, we did fence them, put a man in possession, and apart from the illegal possession of the company we have been in possession ever since, and continued paying rent. *Boulton*, therefore, could not eject us without giving us an opportunity of building. The railway company is in no better position than he. It had two courses open to it—to claim the landlord's rights or to compel us to sell under the *Lands Clauses Act*. The company gave us notice to treat as to the land in both agreements, though they now say that only one of them was in force. They say we made no claim, but the only effect of that is to affect the mode in which the compensation is to be assessed.

[BOWEN, L.J.:—Might not your making no claim be to some extent evidence that you had no right?]

It could at most only be evidence that we thought we had no

(1) 2 App. Cas. 439.

right, and the railway company having given us notice to treat cannot be heard to say that we have no interest.

Ince, in reply :—

The Plaintiffs were mere licensees, and as regards the ground not built upon they were not in possession, and could not require a bond.

[COTTON, L.J. :—I doubt whether we ought to allow that point to be raised for the first time at this stage of the argument, and I do not think it is sustainable.]

1888. Dec. 5. COTTON, L.J. :—

This is an appeal from the decision of Mr. Justice *Kekewich*, and before dealing with the case I will shortly state the facts.

The *Birmingham and District Land Company* is a company which had got three agreements from Mr. *Boulton* and his trustees, who had power to grant leases. The first agreement was dated the 5th of February, 1877, and the second the 5th of April, 1877. The agreement of the 5th of February, 1877, comprised a plot of 8½ acres near *Birmingham*, of which the Plaintiffs got an agreement for a building lease, and that gave them power within ten years from the 30th of November, 1875, to enter upon the land and build, and they were to build within a certain time a certain class of houses. The agreement which is dated the 5th of April, 1877, was a similar agreement relating to 3½ acres of land, and it was for a period of six years from the 30th of November, 1875, so that the second agreement would come to an end in 1881, and the other not until 1885. The third agreement, dated the 27th of October, 1879, only modified the others as regarded the class of houses to be built. There was a provision in the agreements that leases should be granted when houses had been erected, and leases of some of the houses were granted accordingly. There was also a provision which was much relied upon by the Plaintiff company, but which appears to me not to affect the case, that after a certain number of houses, producing a certain rental, had been built, the leases of the other houses should be granted at a peppercorn rent.

Soon after the date of the agreements a railway scheme was

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started by the Defendant company which, if carried into effect, might materially affect these building operations by enabling the Defendant company to take part of the lands included in the agreements. In consequence of the probability that the scheme might be carried into effect, meetings took place between Mr. *Thynne*, the agent for the *Boulton* trustees, and the officers of the Plaintiff company, and although Mr. *Thynne* says there was no agreement come to between him and the agent of the Plaintiff company, and I agree that there was no express contract, yet on the evidence I come to the conclusion that in fact what was said by Mr. *Thynne* to the agent of the Plaintiff company and to the chairman of that company came to this: "Stop the building operations till it is seen what becomes of the railway scheme." The Plaintiff company had urged that, if this scheme was carried into effect, not only would parts of the land be taken and the remainder be prejudicially affected, but there must not be houses of the same class as that contemplated by the agreements. It may be material to consider at what time these meetings took place. The officers of the Plaintiff company do not speak clearly as to the time, though they speak clearly as to what was the nature, of the communication, but Mr. *Thynne* in his evidence does shew that it must certainly have taken place before 1881, and therefore before the second agreement, which was to expire earliest, had come to an end.

[His Lordship then entered into a detailed consideration of part of the evidence, and summed up by repeating his conclusion that what Mr. *Thynne* said was to this effect: "Do not go on with the buildings as long as the railway scheme is unsettled and doubtful."]

In 1883 the Defendant company obtained an Act which enabled it to take a strip of land going through both the 8½ acres and the 3½ acres, and in July, 1883, they bought that strip of land from Mr. *Boulton* and his trustees. The agreement for sale expressly made the purchase by them subject to the three contracts of the 5th of February, 1877, the 5th of April, 1877, and the 27th of October, 1879. Not only was the contract expressed to be subject to those agreements, but the agreements were set forth in a schedule. Then on the 16th of

September, 1884, the railway company gave the Plaintiff company notice to treat, but that notice was not followed up by any step on either side. The Plaintiff company did not send in any claim to shew what interest they claimed, and nothing further was done till February, 1886, when the railway company, as their counsel say, because they thought that by that time these agreements had come to an end, entered into possession without giving the Plaintiff company any bond or making any deposit, as required by the 85th section of the *Lands Clauses Act*. The Plaintiffs thereupon brought their action for an injunction, and to have it declared what their rights were, the railway company asserting that the rights of the Plaintiff company were altogether gone at the time when the railway company took possession. Mr. Justice *Kekewich* gave a judgment by which he did not grant any injunction, because the railway company after the action was brought had given a bond which, though not in accordance with the Act, the Plaintiffs very reasonably agreed to accept as sufficient, but he declared that the agreements were still subsisting, and that the compensation and damages payable to the Plaintiff company must be assessed on that footing. From this judgment the railway company appeals.

Several contentions were raised on behalf of the Appellants which shewed great ingenuity on the part of the counsel who argued the case. The first contention of Mr. *Ince* was that even if the Plaintiff company were entitled to an injunction, yet it would be wrong to go on, under the circumstances of the case, to make any declaration establishing their title. He said there were cases which established, that where a railway company has given a notice to treat under the *Lands Clauses Act*, this Court will not interfere except to grant an injunction against taking possession if the railway company has not done what it ought to do under sect. 85. Now there are cases to this effect, that when a notice to treat has been given, and a claim sent in, although the parties to some extent may be said, though inaccurately, to stand in the position of vendor and purchaser, yet their rights are only rights given by the Act; that any proceedings to enforce those rights must be taken under the Act, and that the Court will not interfere as it would do in the ordinary case of vendor

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and purchaser, since the Act provides a way of dealing with the matter. That is very different from the present case. There are also cases where a railway company has ineffectually sought to get relief in Chancery on the ground that a claim is made against it by a person who has no right at all. That is not the present case. Here the Plaintiffs allege that they have an interest, and that the railway company deny their having any, and have acted in a manner which if the Plaintiffs have an interest is unlawful as against them. The cases cited do not support the contention of Mr. *Ince* that in such a case the Court will not make any declaration of right, especially where, as here, the railway company, as regards the Plaintiff company, stands in a position independent of the Act of Parliament, inasmuch as the railway company bought from Mr. *Boulton*, subject expressly to such rights (if any) as the Plaintiffs had under the agreements between them and Mr. *Boulton*. Therefore, there is a right on the part of the Plaintiffs, independently of the *Lands Clauses Act*, to prevent the railway company who bought with notice of their rights, whatsoever they were, from acting in violation of those rights. In my opinion that contention of the Appellants cannot prevail. The railway company bought subject to such rights as the Plaintiff company may yet have, and we have to consider what those rights are. I should have thought myself that it would be more convenient to the railway company to have it decided, before they went to a jury, what was the nature of the rights of the Plaintiffs, and what the Plaintiffs could insist upon. Of course there may be some matters which will have to be considered then, and which we ought not to decide now, but in my opinion it will be right, having regard to the position of the parties, to declare, as far as we can, what the interest of the Plaintiff company is.

I have already mentioned the facts of the case, and stated my conclusion on the evidence, that before either of the terms of years mentioned in the agreements came to an end, the communication of which I have stated the effect took place between the Plaintiff company and the agent of Mr. *Boulton* and his trustees. The Appellants founded an argument on the special form of the agreements, which were not agreements that the

Plaintiffs should for a certain number of years have the land to build upon, but agreements that they should, for ten years, from a past date in one case, and six years in the other case, have liberty to enter upon the land for the purpose of building houses, and it was urged that nothing took place which could have the effect of making a new agreement or extending the old agreements. I quite agree that what passed did not make a new agreement, but in my opinion, what took place between Mr. *Boulton's* agent (I need not on every occasion refer to the trustees) and the Plaintiffs would have prevented Mr. *Boulton* from bringing ejectment or taking possession of the land as soon as the terms of years limited by the agreements respectively came to an end, it raised an equity against him which would prevent his so doing, and would oblige him, after notice given by him to the Plaintiff company, to give them a reasonable time to complete the building operations which had been stopped by the action of his agent. The case of *Hughes* v. *Metropolitan Railway Company* (1), referred to by Lord Justice *Lindley* during the argument, amply supports that proposition. I think, therefore, that this contention of the Appellants also fails.

Then as to the notice to treat given by the railway company. There has not been any notice by Mr. *Boulton* to the Plaintiff company to go on with the building, and, in fact, after the sale to the railway company it would be impossible for him, as regards the land taken by the railway company, to give any such notice. As to the rest, he had a right to give the notice, but we need not enter into any question as to the rights between him and the Plaintiffs. The effect, in my opinion, of the notice to treat was to put an end to all possibility of building by the Plaintiff company on the land comprised in the notice. It was argued by Mr. *Clare* that what took place between Mr. *Boulton's* agent and the Plaintiff company applied only to such land, if any, as might not be taken by the railway company, but I cannot so understand it. At that time there was no land designated as going to be taken by the railway company, and it would, I think, be impossible to hold that what Mr. *Thynne* said to the Plaintiff company amounted to this: "As regards any land

(1) 2 App. Cas. 439.

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which the railway company do not take you shall have an extended time to build." He gave them a general direction to stop building. The consequence of this may now be different as regards the land taken by the railway company and the land remaining in Mr. *Boulton*, but as regards the former the effect must be that the Plaintiff company were entitled to a reasonable time from the time of the notice to treat. I do not think it advisable to go in detail into the facts of this case, but the accounts which have been put in shewing the claim made for rent as against the Plaintiff company after the period when, according to the Appellants' contention, all right and interest on their part had come to an end, strongly supports the view which I take of the parol evidence in this case. I do not decide, and I do not think my Brothers are inclined to decide, whether, as regards the second agreement (that of the 5th of April, 1877), the time had expired when the railway company took possession. That question will not affect the decree, for the railway company took possession of parts both of the 8½ acres and the 3½ acres, and it is enough to support their application to the Court for relief that the Plaintiffs were in possession under those agreements, or one of them, of the land, or part of it, comprised in them.

I will notice another point, which was first brought forward in reply, and on which therefore we should have given Mr. *Romer* an opportunity of being heard if we had thought it necessary. It was said, "The Plaintiffs, even if the agreement was still subsisting in their favour when the railway company took possession, were not persons to whom any bond was required to be given." This is ingenious, but in my opinion wrong. The Plaintiff company were in occupation, I will not say whether they were in possession or not. Their agreements gave them a right to enter upon the land in order to build. They, in fact, did enter upon both parcels of land, and they did in fact build upon both parcels, and, more than that, the contract bound them to put a fence round the land, which they did, and although it was shewn that this fence was in some parts broken down, still the existence of the fence would be evidence that the Plaintiff company were in occupation. Not only so, but they also, as I understand from

the evidence, had a man there to look after the land, who lived in a house on the land and warned off trespassers, though of course not always effectually. In my opinion, therefore, the Plaintiff company were in occupation of both the plots of land. Now the *Lands Clauses Consolidation Act*, 1845, sect. 84, says: "The promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special Act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein." Then the 85th section empowers the railway company, if they desire to enter before they have complied with the provisions of the 84th section, to do so upon making a deposit and giving a bond, which was not done in the present case. The Plaintiffs were in occupation, and the railway company if they desired to take possession, as they did, were bound before they did so to make a deposit and give a bond to the Plaintiffs. In my opinion, therefore, that contention cannot prevail.

In my opinion the Plaintiffs are right in their contention throughout, and the Appellants, the railway company, are wrong. We think, however, that it would be advisable to make some slight variation in the form of the decree. Lord Justice *Lindley* will read what he has prepared, but that will not affect the costs of the appeal, because, in substance, we affirm the decision of Mr. Justice *Kekewich*, though in form we slightly vary it. We doubt whether it would be right to give any direction as to what should be done by the jury. We declare the rights of the Plaintiffs, and then trust to the Judge to give a proper direction to the jury in order to ascertain what compensation is properly payable to the Plaintiffs.

LINDLEY, L.J.:—

I am of the same opinion, and have very little to add.

Mr. *Ince* made two points in his opening. First of all he said that the procedure was wrong, that the action was wrong, and

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that the parties ought to have proceeded under the *Lands Clauses Act*. Then he said on the merits that the building agreements were not still subsisting when the notice to treat was given. I propose to say a few words upon each of those points.

With respect to the wrong procedure, Mr. *Ince* relied upon the case of the *London and Blackwall Railway Company* v. *Cross* (1), which decided that this Court would not grant an injunction to restrain proceedings under the *Lands Clauses Act*, on the ground that the person claiming compensation had no interest in the land entitling him to take the proceedings. That point, as a matter of practice, has been settled, and it does not appear to me to apply to this case at all. If any lingering doubt could remain on that point it would be more than removed by the extremely able argument of Mr. *Clare*, who shewed to demonstration that the railway company were entering, not under the provisions of the *Lands Clauses Act*, but because they had bought the reversion of the lessors' interest in these lands, and they considered the agreement between the Plaintiffs and the lessors as at an end, in which case of course the company would have been entitled to enter whether the *Lands Clauses Act* had been passed or not. In a controversy of that kind it obviously is perfectly competent to the person claiming the benefit of the agreement to bring an action for specific performance of that agreement, or, at all events, to protect his interest under it, leaving the *Lands Clauses Act* altogether on one side. I do not say that could have been done if the railway company had proceeded under the *Lands Clauses Act*, but they did not. That puts an end to the first point as regards procedure.

The second point is the really important one, viz., whether the building agreements of the 5th of February, 1877 and the 5th of April, 1877, were in any sense subsisting when the notice to treat was given on the 16th of September, 1884. The agreement of the 5th of April, 1877, was to have come to an end at Michaelmas, 1881, that of the 5th of February, 1877, ran on to 1885, and clearly was subsisting at the time of the notice to treat. Now it it is said that, at all events when the railway company entered, which was not till 1886, both these agreements were at an end,

(1) 31 Ch. D. 354.

and, looking at the agreements alone, unquestionably the periods of ten years and six years which were mentioned had come to an end before the railway company entered. But that is not conclusive, and the Plaintiffs adduce evidence to shew that there had been conduct on the part of their lessor which, notwithstanding the expiration of those terms, disentitled him to treat the agreements as at an end.

The legal principle applicable to this case appears to me to have been settled in *Hughes* v. *Metropolitan Railway Company* (1), a case something like this, in which persons were held to have so conducted themselves as to have enlarged the time for doing what had agreed to be done by a particular date. I cannot express the principle better than by reading a short passage from the judgment of Lord *Cairns*. He said (2): "It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." That is the general principle, and I think that it is plainly applicable here. In or about 1880 the railway company had begun to advertise their intention to apply for a bill. I am satisfied from the evidence that soon after those advertisements appeared the building operations under these agreements were suspended—they were certainly suspended before the end of 1881, though we cannot make out the exact date. There is a great mass of evidence, the general short effect of which appears to be that all parties understood that these building operations were to be suspended until the result of the railway scheme was known. In addition to that, the applications made in June, 1882, for rent under the agreement expiring in November, 1881, and the accounts sent in, shew

(1) 2 App. Cas. 439. (2) 2 App. Cas. 448.

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conclusively that these agreements were then treated as still subsisting between the parties to them.

The railway company bought the lessor's interest in July, 1883, the conveyance was much later. They entered in January, 1886, and this action was commenced immediately afterwards. Certainly, the railway company bought with the clearest possible notice of the rights of the Plaintiffs, if any. In fact, the conveyances to them were made very cautiously and clearly, for the agreements were scheduled, which is perhaps a somewhat unusual thing. If they were treated as at an end we should not expect to find them in the schedule, though it does not necessarily follow because they were in the schedule that they had not come to an end. It is perfectly competent for the railway company to contend that although they had notice of the Plaintiffs' rights those rights were really determined. Now, what were the railway company's rights under those circumstances. When the notice to treat was given, the building agreements, in my opinion were not at an end. There had not, it is true, been any agreement to enlarge the time, but there had been such conduct as to preclude the lessors and the railway company claiming under them from treating the agreements as at an end upon the expiration of the term of years mentioned in them. That is in substance what Mr. Justice *Kekewich* has declared. The whole question in the action has really been, were these agreements at an end when the railway company entered or were they not? Mr. Justice *Kekewich* made a declaration that the building agreements were still subsisting, and he also made a declaration that the price or value of the interest of the Plaintiff company in the lands and compensation for severance, &c., ought to be assessed upon the footing that the agreements were still subsisting. That is open to an objection in point of form, that it looks like anticipating the function of those who had to decide the value of the land, but in substance I think the declaration that those agreements were subsisting was right, though there is a little ambiguity about it. The ambiguity becomes more apparent when we bear in mind the different periods at which the agreements came to an end according to their tenour. In order to avoid ambiguity it appears to me and my learned Brothers that we should be a

little more explicit. We propose to strike out the declarations contained in Mr. Justice *Kekewich's* judgment, and to substitute for them the following declarations: "Declare that on the 16th of September, 1884, when the notice to treat was given, the Plaintiffs were entitled as against the Defendants to the benefit of the three agreements of the 5th of February, 1877, the 5th of April, 1877, and the 27th of October, 1879, for the following periods respectively, viz., as regards the agreement of the 5th of February, 1877, for the portion of the ten years mentioned in the said agreement unexpired on the 16th of September, 1884, and, further, for such extended time as on that day was reasonably necessary to enable the Plaintiffs to build the houses to be erected under the said agreement; and as regards the agreement of the 5th of April, 1877, for such extended time as on the 16th of September, 1884, was reasonably necessary to enable the Plaintiffs to build the houses to be erected under the said agreement. And declare that at the commencement of this action the Plaintiffs were rightfully in occupation under the aforesaid agreements of the lands comprised in the notice to treat, or some part thereof, and that the Defendants were not entitled to enter upon and take possession of the lands comprised in the said notice to treat except under the provisions of the *Lands Clauses Consolidation Act*, 1845." The rest of the order will stand as before. It is only right to observe that there appears to have been no discussion before Mr. Justice *Kekewich* as to the form of the declarations. In substance his order was right, and the Appellants must pay the costs of the appeal.

BOWEN, L.J.:—

I only propose to add some words upon the legal principles to be applied to this case, which, after the discussion we have heard, appear to me to be perfectly clear. We took time to consider, not from any doubt as to what the substance of the judgment in this case should be, for I believe we were all perfectly agreed about it, but because we thought that alterations were necessary in Mr. Justice *Kekewich's* declarations, and wished carefully to consider what the declarations ought to be.

The first point, which was a double one, made by Mr. *Ince* and

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Mr. *Clare*, was this. They said the Plaintiffs are not entitled to an injunction at all, and if they are entitled to an injunction they are not entitled to such a declaration of interest as Mr. Justice *Kekewich* has given them. The Appellants urged, in the first place, that a person upon whom a railway company enters ought to go to a jury putting forward at his own risk the title upon which he wishes to rely, and must be left to make good that title afterwards according to the ordinary machinery under the *Lands Clauses Act*, and that it was not only wrong for him to come to this Court for an injunction, but it was also wrong for this Court prematurely to declare the interests of the Plaintiffs, instead of leaving the Plaintiffs to put them forward at their own peril, and prove them in an action upon the award or verdict.

Is this, then, a case in which the Plaintiffs in the first instance were right in coming to the Court for an injunction, and if so ought we to make a declaration as to the character of the Plaintiffs' possession, and to what extent ought the declaration to go? It appears to me that both those questions are answered by considering what is the character of the entry which the railway company here are making. They are not entering under the *Lands Clauses Act*, they have deliberately abstained from taking the proceedings which would give them a right to make an entry under that statute. In the second place, they are entering upon the land of persons who are in occupation. I will not go through what has been said already upon that subject by Lord Justice *Cotton*. I have come to the conclusion like my Brothers that at the time when the entry was made the Plaintiff company were in occupation of the lands in question. The railway company therefore entered upon persons who were in occupation, and who, as will appear from what I say hereafter, were in lawful occupation, and they did not enter under the *Lands Clauses Act*. They were bound, therefore, to rely on the strength of such right to possession as they possessed paramount to the right of occupation which the Plaintiffs were enjoying. Now in such a case the Plaintiffs were justified in insisting that until the provisions of the *Lands Clauses Act* were complied with they were entitled to remain in occupation, and that the railway company had no right to interfere with their occupation. This was, therefore, a case in which

relief might properly be asked at the hands of a Court of Equity. But that does not dispose of the entire difficulty which Mr. *Ince* and Mr. *Clare* put forward, because they said that, even if that were so, the Court ought not to make a declaration as to what the exact character of the Plaintiffs' interest was, but ought to leave that to be decided after the jury had given their verdict. The answer to that contention appears to me to be that inasmuch as the railway company could only lawfully enter by virtue of such right of possession as they had paramount to the rights of occupation of the Plaintiffs, the railway company's defence could only be sustained by shewing that they had some such paramount interest, and inasmuch as they took with notice of the title of the Plaintiffs as against *Boulton*, such paramount interest could only exist upon the ground that the title of the Plaintiff company under the agreements had come to an end. That is the only answer the railway company could have to the action, and whether the agreements had been so extended that the Plaintiff company still had an interest under them was the plain issue raised in the case. It ought not to be supposed that in making the declaration which we do we are in any way intentionally departing from the ordinary course which is pursued in these cases. The declaration is made not in order to assist the jury, but in order to determine the sole issue in the case. The railway company, if they wished to avoid this declaration, ought to have done their best to put an end to the action, and the proper course for them to pursue, if they had entered on the land without complying with the provisions of the *Lands Clauses Act*, was to comply with the provisions of the *Lands Clauses Act* after action brought, and then to take out a summons to stay the action upon payment of costs, because there would be nothing further to decide. As long as they abstained from doing that the Plaintiffs were driven to go down to trial in order to decide the issue which was raised, which is the issue we have decided. So much for Mr. *Ince* and Mr. *Clare's* first point, a point urged with the greatest ingenuity, especially by Mr. *Clare*.

The next point is a simple one, perfectly simple as regards the principle of law and equity to be applied. As Lord *Cairns* put it in the passage which has been read (and which I read again

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simply because I desire to add one word of answer to the argument which was addressed to us by Mr. *Clare*) in *Hughes* v. *Metropolitan Railway Company* (1): "If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." Now, it was suggested by Mr. *Clare* that that proposition only applied to cases where penal rights in the nature of forfeiture, or analogous to those of forfeiture, were sought to be enforced. I entirely fail to see any such possible distinction. The principle has nothing to do with forfeiture. It is a principle which lies outside forfeiture, and everything connected with forfeiture, as will be seen in a moment by reflection. It was applied in *Hughes* v. *Metropolitan Railway Company* in a case in which equity could not relieve against forfeiture upon the mere ground that it was a forfeiture, but could interfere only because there had been something in the nature of acquiescence, or negotiations between the parties, which made it inequitable to allow the forfeiture to be enforced. The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. That is the principle to be applied. I will not say it is not a principle that was recognised by Courts of Law as well as of Equity. It is not necessary to consider how far it was always a principle of common law. Applying that principle to the facts here, I think nobody can

(1) 2 App. Cas. 439, 448.

come to any but one conclusion, viz., that Mr. *Boulton* (and the railway company took subject to his liabilities) had induced the Plaintiff company reasonably to believe that time would not run against them as regards the building agreements, and that he would not enforce his rights as regards time for building, until a reasonable period had elapsed after they should have received notice from him. As soon as the railway company served notice to treat the reasonable time it seems to me necessarily began to run. It is true, as Mr. *Ince* and Mr. *Clare* said, that no fresh agreement was made as to what should be done with regard to these lands, but that does not prevent the equity arising as regards the running of the time, though, of course, it makes the extension of the time less valuable, because, to a certain extent, the Plaintiffs would remain at Mr. *Boulton's* mercy as to the limits of the extension. As soon as we find that the Plaintiffs were in lawful occupation under these agreements, the rest of our judgment seems to me necessarily to follow.

Solicitors for Plaintiffs: *Robinson, Preston, & Stow*, agents for *Rowlands & Co., Birmingham.*

Solicitor for Defendants: *C. H. Mason.*

H. C. J.

C. A.
1888
Dec. 5, 12.

In re BOMBAY CIVIL FUND ACT, 1882. PRINGLE *v.* SECRETARY OF STATE FOR INDIA.

Statutory Jurisdiction—Costs—Power to order unsuccessful Applicant to pay Costs.

By the *Bombay Civil Fund Act*, 1882, jurisdiction was given to the Court of Appeal to determine questions arising between any subscriber to the *Bombay Civil Fund* and the Secretary of State for *India* as to any liability of the fund, nothing being said as to costs. *P.* took proceedings to enforce a claim against the fund, which the Court held to be not made out:—

Held, that however the case might have stood if the question had been whether the Court could give *P.* the costs of a successful claim, the Court had inherent jurisdiction to order him to pay the costs of wrongly putting the Court in motion, there being nothing in the Act to shew that the Legislature intended the Court not to have such jurisdiction.

IN this case Mr. *Pringle*, a retired member of the *Bombay* civil service, claimed certain rights against the *Bombay Civil Fund*, and asked the directions of the Court of Appeal as to the way in which the questions, which he alleged to exist, between him and the Secretary of State for *India* with relation to that fund should be tried. The Court of Appeal directed that the parties should proceed by statement of claim, defence, and reply, and generally as near as might be to the proceedings in an action (1).

Mr. *Pringle* accordingly delivered a statement of claim, and the Secretary of State for *India* moved to strike it out, on the ground that it disclosed no cause of action.

Robinson, Q.C., and *A. Young*, for the motion.

Sir *H. Davey*, Q.C., *Moulton*, Q.C., and *Macnaghten*, for the claimant.

THE COURT was of opinion that the claimant had not by his statement of claim made out any right to relief, but thought that the course of staying all proceedings on the statement of claim, with liberty to the Plaintiff to apply for amending the statement

(1) 39 Ch. D. 300.

of claim or delivering a fresh one on an affidavit verifying the facts, the Plaintiff paying the costs, would meet the justice of the case better than simply striking out the claim and dismissing the action with costs.

Moulton:—The order for payment of costs will be conditional on our accepting the leave to amend.

COTTON, L.J.:—No; we order the Plaintiff to pay costs in any event.

Moulton:—I submit that the Court has no jurisdiction to order the Plaintiff to pay costs. The Act says nothing about costs, and puts the Court of Appeal in the position of an arbitrator, this not being business belonging to the Court as a Court of Appeal. The Lords Justices *Fry* and *Lopes* on the former occasion were evidently of opinion that there was no jurisdiction as to costs.

COTTON, L.J.:—

The point we now have to decide is one not decided by Lords Justices *Fry* and *Lopes* on the former occasion. It is urged that when we dismiss the statement of claim, on the ground that it does not state any legal ground for applying to the Court, we have no jurisdiction to order the unsuccessful plaintiff to pay costs. I think that we have jurisdiction to order him to pay all the costs incurred by his asking wrongly for the interference of the Court. If the question had arisen whether we had jurisdiction to order the Defendant to pay the costs of the statement of claim if it had been successful, that would have been an entirely different question, and on that we need not give any opinion; but as the Plaintiff wrongly applied to the Court for its interference, I think that we have jurisdiction, independently of any statutory enactment, to make him pay the costs occasioned by that wrongful application.

BOWEN, L.J.:—

I am of the same opinion. I have always understood it to be a broad principle that a Court which is put in motion wrongly has inherent jurisdiction to compel the person who puts it in

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motion wrongly, and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding, to pay the costs. I have always so understood, and I believe that in my recollection this principle has been acted upon by the Court of Appeal since I have been a member of it. Of course it would be otherwise if it could be shewn that there was something in the Act under which the Applicant comes to this Court which prevents his application from being really an application to the Court at all, and gives it the character of a step in a proceeding in the nature of an arbitration in which there were to be no costs on either side. I do not find anything in the present Act which can have that effect. I think it was the intention of the Act that in case a fruitless and unjustifiable application was made to the Court, the Court should have its ordinary power of saying that such an application should be dismissed with costs. As to all other questions concerning costs in proceedings under this Act, except the sole question whether costs can be inflicted by the Court on an unsuccessful applicant, I pronounce no opinion.

Solicitors: *Rowcliffes, Rawle, & Co.; Solicitor, India Office.*

H. C. J.

C. A. 1888 *Dec.* 14.

In re LEIGH. LEIGH *v.* LEIGH.

[1875 L. 163.]

Ward of Court—Marriage in Contempt—Settlement—Jurisdiction—Infants' Settlements Act (18 & 19 *Vict. c.* 43) [*Revised Ed. Statutes, vol. xii., p.* 468].

The Court has no jurisdiction to compel an infant ward of Court to make a settlement of his own property because he has been guilty of contempt in marrying without leave.

A Defendant to an action in which he was made a ward of Court married without leave, being in the twentieth year of his age. About eight months afterwards, he having in the meantime attained the age of twenty, an order was made on the application of his testamentary guardian in the action and in the matter of the *Infants' Settlements Act*, that a proper settlement of his property should be settled by the Judge, and that he should execute the settlement when so settled. He accordingly executed a settlement approved by the Judge. As soon as he attained twenty-one he brought his action to set aside the settlement, and also appealed

against the order directing it. He deposed that he had always objected to the settlement and executed it only because he thought he should get into trouble if he did not:—

Held, that the order for a settlement must be discharged, for that the Court had no jurisdiction to compel the ward to make a settlement, and the order was in form and substance an order *in invitum*, and could not be construed as merely authorizing him to execute a settlement which he was willing to make.

Whether, after such a lapse of time, the settlement could be treated as made "upon the marriage" within the meaning of the *Infants' Settlements Act*, *quære*.

Whether the Act can be resorted to after a male infant who marries under the age of twenty attains that age, *quære*.

A SUIT was instituted in 1875 for the administration of the estate of *Henry Blundell Leigh*, and a decree was made in due course. *Richard Cecil Leigh*, one of the testator's sons, was a Defendant, and his testamentary guardian was his mother, the testator's widow, who was one of the Plaintiffs. He was born on the 2nd of April, 1866, and on the 17th of October, 1885, he married without the leave of the Court, being, as will be observed, under the age of twenty. He took a large interest in his father's estate.

A managing clerk of the then solicitors of the family deposed that on the 7th of June, 1886, he had an interview with *R. C. Leigh*, and spoke to him as to his contempt of Court, and explained to him that the proper course would be for him to at once submit himself to the judgment of the Court, and execute such settlement as the Judge might direct. That *R. C. Leigh* at first stated his wish that the settlement should be delayed till he came of age, but eventually concurred in the proposal that the Court should be asked to approve a settlement, but said he must have some income at once, and wished the deponent to apply for the allowance of £2000 a year until his majority.

On the 10th of June, 1886, an order in the cause and in the matter of the *Infants' Settlements Act* (18 & 19 Vict. c. 43), was made by Mr. Justice *Kay* on the application of Mrs. *Leigh*, the widow, as testamentary guardian of *R. C. Leigh*, for an inquiry whether *R. C. Leigh* had contracted a valid marriage, "And if so it is ordered that a proper settlement of the property of the said infant upon such marriage be settled by the Judge. And it is

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ordered that the said infant, *R. C. Leigh*, do execute such settlement under the provisions of the above-mentioned Act." The order continued an allowance of £2000 a year previously directed to be paid for the benefit of *R. C. Leigh*, and made provision for raising £6000 for payment of his debts.

The question whether the Court had jurisdiction to make an order *in invitum* upon the infant to execute a settlement of his property was not raised before Mr. Justice *Kay*.

On the 16th of December, 1886, *R. C. Leigh* executed a settlement, approved by the Judge, of a considerable part of the property to which he was entitled under his father's will.

On the 2nd of April, 1887, *R. C. Leigh*, having attained twenty-one, commenced an action to set aside the settlement, and also gave notice of appeal from the order of the 10th of June, 1886, asking that so much of that order as directed a settlement might be discharged, and that the settlement might be cancelled, and that if the Court should consider the order to be an interlocutory order which ought to have been appealed from within twenty-one days, the Court would allow the appeal to be brought though that period had expired.

R. C. Leigh made an affidavit, in which he deposed that he from the first objected to the settlement, and executed it "believing that if I did not I should get into trouble for disobedience to the order of the Court and should be deprived of any allowance for the support of myself and my wife during the remaining period of my minority. But for these considerations I would not have executed the settlement."

Romer, Q.C., *Dauney*, and *Reginald Neville*, for the appeal:—

We contend that the Court has no jurisdiction to make an order against an infant *in invitum* to make a settlement of his property, because he has been guilty of a contempt: *In re Murray* (1); *Buckmaster* v. *Buckmaster* (2); *S. C. sub nom. Seaton* v. *Seaton* (3); *Field* v *Moore* (4). When the order now under appeal was made *Buckmaster* v. *Buckmaster* had not been heard by the Court of Appeal. The language of the *Infants' Settlements Act* (18 & 19

(1) 3 D. & War. 83.
(2) 35 Ch. D. 21.
(3) 13 App. Cas. 61.
(4) 7 D. M. & G. 691, 699.

Vict. c. 43), s. 4, shews that the consent of the infant is necessary to any disposition under the Act, it gives the Court no power to make an order *in invitum*.

Hastings, Q.C., and *Swinfen Eady*, for the Respondents :—

Assuming the Court to have no jurisdiction to order a person to execute a settlement, still if the party assents to the order and executes the settlement it will be good. The settlor got consideration for the settlement in the allowance of £2000 a year and the provision for his debts.

[BOWEN, L.J. :—This is an appeal from the order, and if the order is *ultrà vires* how can the subsequent conduct of the Appellant affect an appeal from it ?]

We say the Court had jurisdiction to commit the Appellant for his contempt in marrying without leave, he was released from the consequences of his contempt and obtained a sum to pay his debts in consideration of his executing the settlement. He in fact assented to the making the order, it was in substance an order giving him leave to make a settlement. An infant who executes a settlement and thereby escapes being committed cannot say that he was coerced into making the settlement.

[COTTON, L.J. :—The order does not express that the infant made the settlement that he might be excused from the consequences of contempt. It proceeds on the footing that the Court had jurisdiction to order him to execute it, and he must have supposed that such was the case. It is a positive order for breach of which he might have been committed, not an order giving him leave to make a settlement. Then, moreover, was this a settlement "upon" the marriage so as to come within the *Infants' Settlements Act ?*]

In re Sampson and Wall (1) shews that the settlement may be made after the marriage.

[BOWEN, L.J. :—The Act provides that nothing in it shall apply to a male infant under twenty, or to a female infant under seventeen. Here the marriage took place before the Appellant had attained the age of twenty.]

(1) 25 Ch. D. 482.

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In re Phillips (1) is a decision that where an infant marries under the prescribed age the Act may be resorted to when that age has been attained. Where there has been a contempt in solemnising a marriage the Court can refuse to allow the funds to be paid out till a proper settlement has been executed: *Martin* v. *Foster* (2). That principle applies here.

[COTTON, L.J.:—That case appears to proceed on the ground that the husband, who had committed a contempt in marrying the ward, should not be allowed to take advantage of his own wrong by getting the wife's property without making a proper settlement.]

Methold, for the trustee of the will.

COTTON, L.J.:—

This is an appeal brought by leave after the regular time for appealing against an order made by Mr. Justice *Kay*. It is an appeal by a Mr. *Leigh*, who lately attained twenty-one. He when he was under twenty married a lady, now his wife, and more than six months after he had so married an order was made by Mr. Justice *Kay* directing an inquiry whether there was a valid marriage, and if so directing a proper settlement to be settled by the Judge, and he was ordered to execute a settlement as so settled. He did execute the settlement in December, 1886, and as soon as he attained twenty-one he appealed against the order. Now was the order right? I think not, looking upon it as an order made by the Judge against the infant *in invitum* ordering him to deprive himself of a considerable interest in his property. In my opinion, however good it might be for the parties, the Court of Chancery has no jurisdiction or power to make any such order. If the Appellant committed a contempt of Court by marrying without the leave of the Court, for that he might be sent to prison, but that would not give the Court power to order him to execute a settlement by which he deprived himself of his own property. It would be very different if he married a female ward of Court and so obtained certain rights as her husband over her property. Then the Court commits him for contempt of

(1) 34 Ch. D. 467. (2) 7 D. M. & G. 98.

Court, and allows him to purge himself of his contempt by depriving himself of all the benefits from the property of the woman which by committing the contempt he had obtained. But in the case of *Buckmaster* v. *Buckmaster* (1) we expressed our opinion, which was concurred in by the House of Lords, that there is no jurisdiction to compel a ward of Court to settle his own property.

It was suggested ingeniously by Mr. *Hastings* that the application to Mr. Justice *Kay* must be looked upon as an application by the husband to have liberty to exercise the powers of the *Infants' Settlements Act.* Now the order was not made till June, 1886, the marriage having been in October, 1885, and the settlement was not executed till December, 1886. I am going to decide the case upon another point, but it must not be considered that I in any way acquiesce in or favour the suggestion that this can be considered a settlement "upon the marriage" so as to come within the Act. The words of the Act are "upon or in contemplation of the marriage." In *In re Sampson and Wall* (2) the majority of the Court differed from me in construing those words as meaning "on the occasion of the marriage," and in holding that the Act applied to post-nuptial settlements. But I see nothing in their judgment which would in any way favour the conclusion that this settlement can be considered as a settlement made upon the occasion of the marriage, when there was this considerable length of time intervening between the marriage and the order of the Court. The House of Lords left that point open, and I do not think it necessary to decide it here, because in my opinion the application cannot be looked upon as an application by the male infant. The solicitor told him, and no doubt he told him what was quite true, "You had better submit to the Court, otherwise you may be sent to prison." But the Appellant was not told "the Court has no power to order you to make a settlement of your own property, it can only commit you." The application cannot, in my opinion, be looked upon as an application made with the consent of the infant or for him by the guardian, but as a proceeding against him to force him to execute a settlement whether he wished it or not. In my opinion this was not an application under the *Infants' Settlements Act,* but an

(1) 35 Ch. D. 21. (2) 25 Ch. D. 482.

C. A. 1888 *In re* LEIGH. LEIGH *v.* LEIGH.

application made in the view that the Court had power to order the Appellant to execute a settlement of his own property, and therefore Mr. *Graham Hastings*' argument cannot be maintained.

In my opinion the Appellant has a right to claim from the Court the discharge of the order, and of the settlement which, under the circumstances stated, he executed.

LINDLEY, L.J.:—

I am of the same opinion.

It is quite obvious from the note taken of Mr. Justice *Kay's* judgment that this point about the jurisdiction of the Court was passed over *sub silentio*: it was assumed, and not argued or discussed. The decision of this Court in *Buckmaster* v. *Buckmaster* (1) had not then been pronounced, and it seems to me to have been taken for granted that if a ward of Court married, the Court had power to make him execute a settlement. I confess that that erroneous idea was more or less prevalent till it was carefully examined in this Court and in the House of Lords in *Buckmaster* v. *Buckmaster* (2), but it is now well settled that the Court has no jurisdiction to compel an infant ward to make a settlement of his own property. If that had been present to the mind of Mr. Justice *Kay*, this order would not have been made. The order is wrong in point of form. The *Infants' Settlements Act* says that the infant may make the settlement with the sanction of the Court, but it does not give the Court power to make a compulsory order which it could not make before. It gives to infants, in the case of a male over twenty, and in the case of a female over seventeen, capacity to do, with the sanction of the Court, that which they could not before, viz., to make binding settlements. I am satisfied that the order under appeal was made *per incuriam*, and it is an order that cannot stand.

Then it is said that the order may be upheld on the ground that it really was an order sanctioning a settlement made by the infant. That question depends upon the facts; the facts do not support the contention nor does the order. The order is an imperative order, and the young man would understand, and the solicitor who advised him would also understand, that in the case

(1) 35 Ch. D. 21. (2) 35 Ch. D. 21; 13 App. Cas. 61.

of such an order he would have no option. It is true that this gentleman had represented to him the position that he was in, but the effect of all that is simply this: "You are in a scrape, and you must do whatever the Court tells you in order to get out of it." He had no option, and it was never pointed out to him that he was at liberty not to make a settlement if he liked. I am satisfied, for the reasons which have already been given, that this order is one which cannot possibly be maintained.

BOWEN, L.J.:—

I am of the same opinion, and have nothing to add.

COTTON, L.J.:—

I think I ought to add that we do not in any way enter into the question as to whether the *Infants' Settlements Act* applies where a male infant marries under the age of twenty. We give no opinion upon that point.

THE COURT doubted whether it had jurisdiction on the present appeal to direct the settlement to be cancelled, though their decision made it worthless. Their Lordships, therefore, only discharged the order appealed from, leaving the action to set aside the settlement to go on.

Solicitors: *Parker, Garrett & Parker; Lowe & Co.; Rowcliffes, Rawle & Co.*

H. C. J.

C. A.
1888
KEKEWICH, J.
July 7, 14.
C. A.
Dec. 14, 20.

In re NORWICH TOWN CLOSE ESTATE CHARITY.

[1888 N. 770.]

Charity or not—Summons—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 28 [*Revised Ed. Statutes, vol. xi., p.* 989].

On a summons issued under the *Charitable Trusts Acts* the Court has jurisdiction to decide the question whether the property which is the subject of the summons is held upon a charitable trust or not.

Decision of *Kekewich*, J., reversed.

AN action was brought by certain freemen of the city of *Norwich* on behalf of themselves and all other the freemen against the mayor, aldermen and citizens of the city of *Norwich* and Her Majesty's Attorney-General, respecting certain lands at *Norwich*, called the *Town Close Estate*, which had been conveyed to the corporation in 1524. The action was tried before Mr. Justice *Kekewich*, who, on the 23rd of March, 1887, gave judgment declaring that "the mayor, aldermen and citizens of the city of *Norwich* are seised of and entitled to the hereditaments and premises in the pleadings mentioned and called the *Town Close Estate* and the rents and profits thereof, upon trust and for the benefit of the Plaintiffs and all other the freemen for the time being of the city of *Norwich*." And it was ordered that an inquiry be made who are the persons entitled as freemen of the city of *Norwich* to participate in the rents and profits of the *Town Close Estate* and what persons are entitled to be admitted as freemen of the said city. "And the Defendant Her Majesty's Attorney-General, by his counsel desiring that a scheme should be settled for the management and application of the trust property, this Court doth not think fit in this action to direct such scheme as aforesaid, but this judgment is to be without prejudice to any other proceedings that may be taken by the Defendant Her Majesty's Attorney-General, in that behalf."

On the 24th of May, 1888, the solicitors for the Attorney-General issued a summons against the corporation intituled "In the matter of the *Norwich Town Close Estate Charity* and in the matter of the *Charitable Trusts Acts*, 1853 to 1869," to have a

scheme settled for the regulation and management of "the above-mentioned charity." It was afterwards served on the Plaintiffs.

The Plaintiffs on behalf of the freemen denied that this was a charity, and alleged that the land belonged to them as individuals. They took the preliminary objection that the question whether there was a charity or not could not be decided on a summons under the *Charitable Trusts Acts*. This point was argued in Court.

The summons came on for hearing before Mr. Justice *Kekewich* on the 7th of July, 1888.

Warmington, Q.C., *Swinfen Eady*, and *Shearman*, for the Plaintiffs:—

This is not a charity, and such a summons is not the proper method of proceeding unless there is clearly a charity; and that question cannot be determined on such a summons. The Act 16 & 17 Vict. c. 137, only concerns the administration of funds and gives no power to decide the question whether there is a charity. The only declaration made by the Court in the action is that there is a trust, but that does not constitute a charity. The words of Sir *S. Romilly's Act* are wider, but even under them it has been held that there was no jurisdiction to try the question: *In re Dean Clarke's Charity* (1); *In re Manchester New College* (2). This is a proceeding under the statute and not in the ordinary jurisdiction, and the Court can only decide where power has been given by the statute: *Ex parte Rees* (3); *In re Newark Charities* (4). One inconvenience would be that the freemen would have no powers of discovery or of compelling the production of documents.

Ingle Joyce, for the Attorney-General:—

The case of the Attorney-General is that the judgment defines the trust, and on the authority of *Goodman* v. *Mayor of Saltash* (5) the trust is charitable. The Court has in fact to decide

(1) 8 Sim. 34.
(2) 16 Beav. 610.
(3) 3 V. & B. 10.
(4) 6 L. J. (Ch.) N. S. 215.
(5) 7 App. Cas. 633.

C. A. 1888 — *In re* Norwich Town Close Estate Charity.

the question charity or no charity in every case before it can act under the statutes: *Re Davenport's Charity* (1). Schemes are constantly directed under such summonses.

P. H. Lawrence, for the corporation of *Norwich*.

Warmington in reply.

1888. July 14. Kekewich, J.:—

It was urged on behalf of the Respondents that, in exercise of the discretion which is undoubtedly vested in me, I should hold it to be inconvenient to decide on this summons the question whether there is a charity or not, and should say that on that ground the Attorney-General ought to raise it by action; and it is right to add that the Attorney-General offered at once to submit to an expression of opinion favourable to that view. I am not impressed by the argument addressed to me on this point. There is great advantage in simplicity of proceedings, and I do not attach importance to the suggestion of the exigencies of discovery. I fail to see what discovery can be usefully required from the Attorney-General, and I am satisfied that he would submit to any reasonable order for the purpose, even if it could not be made without such submission. On the other hand, I recognise the importance of having a question of law decided on a definite issue raised in a definite manner, and experience teaches that this is sometimes a grave defect in simple proceedings, and, moreover, that the defect, though not visible in the first instance, becomes apparent at a later stage when it is past remedy. I have thought it right to say thus much, but I shall say no more, because, in the view which I take of the construction of the Act, the point does not necessarily call for decision. If, ultimately, another view of the construction of the Act should prevail, I wish to leave this point open.

The main question is, whether the establishment of a charity or of a charitable trust is within the scope of the Act of 1853. It is intituled "An Act for the better Administration of Charitable Trusts," and the preamble adds to that object, "the more

(1) 4 D. M. & G. 839.

beneficial application of charitable funds." What is "charitable" is not defined, but it may be treated as equivalent to "belonging to a charity," and one finds a definition of a charity in sect. 66, which must be read in connection with sect. 48 of the Act of 1855. There is no occasion to criticize this definition further than to say that it obviously does not advance the determination of the question before me, while it opens a new one which need not be pursued—namely, whether the property with which this case is concerned falls within the language there employed. Unassisted by definition, I consider the language of the Act and its intent and purpose generally. Respecting by far the larger number of institutions possibly falling within its scope, no doubt exists whether they are charitable or not, and the Act seems to have been drafted on the assumption that this would invariably be the case. And it might well be held that the remedial character and extent of the Act cannot properly be narrowed by an issue whether the particular application refers to a charity or not, unless raised on substantial ground. If, however, sect. 28 applies to a given property or institution, other sections of the same Act are equally applicable to it, and other powers would be exercisable in connection with what never has been, and possibly never may be, determined to be a charity. I observe also that, by the Act of 1860, the Commissioners have all the powers given to the Court by the Act of 1853, and though there are safeguards against such an exercise of the jurisdiction, they might be called on to decide whether there is a charity in such a case as the present.

The real question between the Attorney-General and the *Norwich* freemen—viz., whether there is a charity to be administered—is of some difficulty. No one could gainsay that, especially having regard to the cases of *In re Christchurch Inclosure Act* (1), and *Goodman* v. *Mayor of Saltash* (2). One would not readily assume that it was the intention of the Legislature that a question like that should be determined on an application for the settlement of a scheme made under an enactment expressly directed to administration only. In my judgment the tenor of the Act

(1) 35 Ch. D. 355; S. C. Since reported on appeal, 38 Ch. D. 520.
(2) 7 App. Cas. 633.

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is adverse to such a conclusion. I do not think that much, if any, assistance can be derived from sect. 41. If the Attorney-General is right, the *Norwich* freemen are no less *cestuis que trust* than if he is wrong, and they cannot be treated as persons holding or claiming property adversely to the charity. The authorities are of little use. Two only were cited by Mr. *Warmington*, and I need not refer to others which are mentioned in the reports of those two. They all arose under Sir *S. Romilly's Act*, which may fairly be referred to as analogous to that of 1853, and as expressed in language of certainly not less extensive application. In the case of *In re Dean Clarke's Charity* (1), there was no doubt whatever of the existence of a charity, the trustees whereof were petitioners; and the question was whether the conflicting claims of respondents could properly be decided on petition. In *In re Manchester New College* (2) the Master of the Rolls considered a petition proper, because there were no conflicting interests. The case was really cited for the remarks on the comparative advantages and disadvantages of summary proceedings, which I do not think it necessary further to discuss. There was cited on the other side the case of *Re Davenport's Charity* (3), but that only deals with the narrow question whether the provision in the Act of 1853 for the appointment of new trustees was exercisable in a case of lunacy.

To the *Trustee Acts*, as somewhat analogous, one naturally turns on such a question as this. I humbly venture to think that the jurisdiction conferred by those Acts might properly, and with advantage, have been construed to extend to many cases decided not to fall within them, but the rule has been laid down, and has been strictly followed, that it is necessary, first, to find a trust declared by will, contract, or judicial decision before the provisions of the Act can be called into operation. *In re Cuming* (4) establishes an exception from this rule of executed contracts, but the exception serves to illustrate the extent and rigour of the rule itself. The analogy ought not to be severely pressed, but, so far as it holds good, it is in favour of a limited construction of the Acts here in question. The result is that I must sustain the

(1) 8 Sim. 34.
(2) 16 Beav. 610.
(3) 4 D. M. & G. 839.
(4) Law Rep. 5 Ch. 72.

objection taken by the Respondents to the Attorney-General's application, and hold that, before issuing a summons under the Acts for the settlement of a scheme for the regulation and management of the alleged charity, he must establish by independent proceedings that there is a charity to be regulated. The summons is so intituled, and necessarily so intituled, as to assume the existence of a charity and the applicability of the Act to the *Town Close Estate*. It is just that which cannot be assumed, nor, in my judgment, be determined in this proceeding.

The summons was accordingly dismissed, the costs of all parties except the Attorney-General, being ordered to come out of the estate.

C. M.

The Attorney-General appealed. The appeal was heard on the 14th of December, 1888.

Sir *R. Webster*, A.G., Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the appeal:—

We contend that on the face of the decree there is a charitable trust: *Goodman* v. *Mayor of Saltash* (1); *In re Christchurch Inclosure Act* (2); and the only question is whether the Court has jurisdiction to say so on this summons. We contend that it has, under the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), sect. 28, which gives the Court the same jurisdiction on summons as in a suit. Express power is given to direct an information, bill, or petition to be resorted to if the Judge thinks it desirable, but that does not limit the jurisdiction on summons. Sect. 42 refers to the establishment of a scheme as one of the objects which may be sought under the Act. Sect. 17 is not confined to a charity already established, *Braund* v. *Earl of Devon* (3); which makes against so confining the 28th section. In *Re Davenport's Charity* (4) the Lord Chancellor laid down that under sect. 28 the Court has the same jurisdiction as on information, and the

(1) 7 App. Cas. 633.
(2) 38 Ch. D. 520.
(3) Law Rep. 3 Ch. 800.
(4) 4 D. M. & G. 839.

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case of *In re Sir R. Peel's School* (1) is decisive on the question. *In re St Bride's, Fleet Street* (2) is to a like effect, but we do not rely on it, as there appears to have been a sort of arrangement that the point should be decided on summons. The cases referred to below under *Sir S. Romilly's Act* (52 Geo. 3, c. 101) will probably be relied on again, but the language of that Act is so different, that decisions under it are really no guide in construing the present Act; and even under that Act the Court held that it could decide between two conflicting charities a question of law arising on the construction of a particular instrument: *In re Upton Warren* (3). There is no possible good in putting us to an information when the only question is as to the effect of the decree, a point which can be decided on summons just as well as in any other way.

Warmington, Q.C., *Swinfen Eady*, and *Shearman*, for the Plaintiffs:—

The summons is intituled "In the matter of the *Norwich Town Close Estate Charity*." No such charity is known—the term was never before used. The title assumes the existence of a well-established charity. It is impossible to decide whether this is a charity or not without looking at the documentary evidence produced at the trial, and not merely at the decree. The decree decided nothing more than that the corporation did not hold the land for their own benefit, but for the benefit of the freemen. The *Municipal Corporations Act* (5 & 6 Will. 4, c. 76, s. 2) reserves all the individual rights of freemen. An instance of this is furnished by *Hopkins* v. *Mayor of Swansea* (4), where property held by the corporation for the benefit of the burgesses was decided to be private property. See also *Prestney* v. *Mayor of Colchester* (5). We do not wish any unnecessary expense, but the present case is one where it is important that the Court should not make an order, as to the jurisdiction to make which there is any doubt. Before 1853 the only statutory way of interfering with breaches of charitable trusts was that furnished by *Sir S. Romilly's Act*

(1) Law Rep. 3 Ch. 543.
(2) 35 Ch. D. 147, n.
(3) 1 My. & K. 410.
(4) 4 M. & W. 621.
(5) 21 Ch. D. 111.

(52 Geo. 3, c. 101), and that was held to be confined to the administration of existing charities. The preamble of the Act of 1853 states that it is expedient to provide means for securing the due administration of charitable trusts, and is against the view that to decide whether there is a charity comes within its scope. We say that where there is a reasonable dispute whether a trust is charitable, it is outside the Act. Sect. 41 excludes the trial of all adverse claims, and this is a claim by the freemen adversely to the charity. The Act was not intended to exclude from the ordinary jurisdiction of the Court the question whether there is a charity or not. In the case of *In re Sir R. Peel's School* (1) the existence of a charitable trust was admitted. The contention there was that it was taken out of the Act because Sir *R. Peel* had power to discontinue it. Even if a case, where the existence of a charitable trust is reasonably disputed, is not taken out of the Act, the case is so questionable that the Court will direct the ordinary procedure to be followed. We allege this estate to be the private property of the freemen.

Sir *R. Webster*, in reply:—

This is not a case of adverse claim within sect. 41 of the Act of 1853, the claim of the Plaintiffs being under the trust declared by the decree.

Cotton, L.J.:—

This is an appeal to us from a decision of Mr. Justice *Kekewich* that no order can be made on this summons on the ground that there is no jurisdiction under the Act to decide on summons whether under the circumstances of the case there was or was not a charitable trust. The contention of the Respondents was this: "We claim to have private property in this particular land." The Attorney-General says that the question whether there is a charitable trust is decided by the decree which has been made in an action brought by some of the freemen on behalf of themselves and the other freemen against the corporation of *Norwich*. What was the question there? The corporation, who had the

(1) Law Rep. 3 Ch. 543.

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legal estate in this property, said, "This is part of the borough funds belonging to us as the corporation." The freemen said, "No; this is property which has been appropriated and set apart for the benefit of the freemen only, and is no part of the funds belonging to the corporation as part of their borough fund." The Court decided in favour of the freemen, and made a declaration, "That the mayor, aldermen and citizens of the city of *Norwich* are seised of and entitled to the hereditaments and premises in the pleadings mentioned, and called the *Town Close* estate, and the rents and profits thereof, upon trust for, and for the benefit of the Plaintiffs and all other the freemen for the time being of the city of *Norwich*." The Attorney-General says that that decides that this is land held as a charity, but the exact purposes of the charity are not determined, nor how it is to be applied, and I think he is right in saying that such a declaration could not be made consistently with law unless there was a charitable trust. The freemen are not incorporated, and there is no suggestion that there was any grant to them by the Crown in such terms as as to make them a corporation, nor did they make any such case in the action which they brought. By their statement of claim they claimed just what was given by the decree, viz., a declaration of right in the freemen for the time being, not in a corporation consisting of freemen incorporated under any grant from the Crown.

I think that the question whether such a trust is charitable was decided by the House of Lords in *Goodman* v. *Mayor of Saltash* (1), and I take that portion of the judgment of Lord *Cairns* which was quoted by Lord Justice *Lindley*, who delivered the judgment of the Court in the case of *In re Christchurch Inclosure Act* (2). There was evidence there that the free inhabitants of ancient tenements in the borough had enjoyed from time immemorial the benefit of dredging for oysters in the property, and it was sought to establish a claim on behalf of those persons as against the corporation. On what grounds? I will read what Lord *Cairns* said (3): "Then I come to the question, Is there any difficulty, in that state of things, in supposing, what we are bound

(1) 7 App. Cas. 633. (2) 38 Ch. D. 520.
(3) 7 App. Cas. 650.

to suppose if it is possible, an ancient grant to the corporation of *Saltash* which would explain and reconcile the whole of the practice which we have thus laid before us? It appears to me that there is no difficulty at all in supposing such a grant, a grant to the corporation before the time of legal memory of a several fishery, a grant by the Crown, with a condition in that grant in some terms which are not before us, but which we can easily imagine—a condition that the free inhabitants of ancient tenements in the borough should enjoy this right, which, as a matter of fact, the case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities." If this trust for the freemen of *Norwich* were not a charitable trust, it would undoubtedly be exposed to the objection of the rules against perpetuity, and if this trust in favour of the freemen for the time being can be supported, it can only be on the ground that it is a charitable trust. In my opinion, the declaration of Mr. Justice *Kekewich* determines that this is a charity, and that being so there is no question that there is jurisdiction under the Act in question to give any direction which may be right as to the mode of administering this charity and carrying it into effect, of course, having regard to the trusts directed by the grant which is established, and as to which a declaration is made by Mr. Justice *Kekewich*.

We differ from Mr. Justice *Kekewich*, whose judgment is the foundation of the whole claim of the Attorney-General; but sometimes those who have to determine what a judgment means and

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what the effect of it is are better able to decide that than the person who gave the judgment or made the declaration. In our opinion that judgment does in fact decide that this is a charity.

Lindley, L.J. :—

I am of the same opinion.

Having regard to the declaration made to which the Lord Justice has referred, it appears to me that there is an end of the case. There is nothing to try. What could be tried? Let us work it out. Given this judgment of Mr. Justice *Kekewich* and this declaration of trust, should there be an information to have it declared that that is a charitable trust? That would be an idle process which could only have one result. It seems to me on the face of that judgment, that this case falls obviously within sect. 28. I am satisfied now from a careful examination of the words that that is the true construction.

I think the appeal must be allowed.

Bowen, L.J. :—

I agree.

I think that the question which has been argued with so much ingenuity does not really arise, and that it is a clear case of a charity under sect. 28.

1888. Dec. 20. The Plaintiffs moved that the order of the 14th of December might be confined to declaring that the Court had jurisdiction on the summons to determine whether or not the *Norwich Town Close Estate* was held upon a charitable trust within the meaning of the *Charitable Trusts Acts*, and that the summons might be remitted to the Judge to be determined on the merits, or, in the alternative, that the drawing-up of the order might be stayed, and the appeal set down again before the Court of Appeal to be argued on the merits.

Warmington, Q.C. (*Swinfen Eady*, and *Shearman*, with him), for the motion :—

We desire to have an opportunity of arguing the case on the

merits, which were not considered below and have not been argued here.

[COTTON, L.J.:—How can the trust be valid except as a charitable trust?]

We shall contend that the freemen are for this purpose a corporation. This is a case of rights preserved by the *Municipal Corporations Act*, 1835 (5 & 6 Will. 4, c. 76), s. 2, and *Goodman* v. *Mayor of Saltash* (1) has no reference to rights so reserved.

[COTTON, L.J.:—We are all of opinion that the question charity or no charity must be decided on this summons, but the point now raised has not been argued.]

[Sir *Richard Webster*, A.G.:—I make no objection to the Plaintiffs having an opportunity of arguing it either here or below.]

It was then arranged that the further hearing should take place before the Court of Appeal, that course being considered to be upon the whole the most convenient under the circumstances.

COTTON, L.J.:—

We think it right to dispose of the question as to jurisdiction, so that there may not be an argument on that point when the case comes on again, when probably the Court will be differently constituted.

It has been contended that there is no jurisdiction on a summons taken out under the *Charitable Trusts Act* to decide whether there is a charity or not. Now, in my opinion when the question comes before the Court, whether an order shall be made on the summons for a scheme, the Court must, of necessity, be able to determine whether that with reference to which the scheme is asked is a charity or not. Of course it can decide that there is no charity, as Mr. *Warmington* admits, but it is essential that the Court which directs a scheme to be prepared and settled should have jurisdiction to decide that there is a charity with reference to which a scheme can be directed. It is very true that if there are persons claiming adversely to a charity, and who

(1) 7 App. Cas. 633.

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are not willing to abide by the opinion of the Court as to whether it is a charity or not, then in order to enforce the charity as against these adverse claimants there must be an information, because on the summons there is no jurisdiction to enforce a scheme against adverse claimants. It may be that in many cases where there is jurisdiction and where a scheme might be directed it would be more convenient to say, "No, we will not decide it on summons because we could not enforce the decision against adverse claimants, and therefore, instead of dealing with it on this summons we will direct the Attorney-General to file an information in order to decide the question of charity or no charity, and also, if there is a charity, to enforce it against persons who claim an interest in their own private right, and who would not be content with an expression of opinion by the Court as to whether this is a charity or not." Here Mr. *Warmington's* clients say: "We want this question settled in the most inexpensive way possible." That amounts to this, that if the Court has jurisdiction, as I think it has, to decide that this is a charity, they will not insist on being treated as adverse claimants, nor refuse to allow the rents of the property or of the land to be enjoyed by the charity without an adverse decree against them compelling them to hand over the property to those who under the charity are entitled to it.

Lindley, L.J.:—

I am of the same opinion.

When a summons is taken out, looking at the matter from a practical point of view, what is the Judge to do? The point made is that he has no jurisdiction on the summons to decide whether there is a charity or not. Who is to decide it? He cannot, merely because somebody says there is no charity, say, "I cannot entertain the summons." If you look at the matter with a view to what is most advantageous to the litigants there is nothing to be said in favour of an information over a summons. You can get the same discovery and you can get the same question tried on a summons as on an information. Nobody suffers in practice by having the question determined upon a summons, and to say that the judge before whom the summons comes

cannot say whether there is a charity or no is to my mind an absurdity. It is arguing in a circle. What is to be done is another matter. When it is determined on summons that there is a charitable trust, if anybody claims adversely to the charity and refuses to hand over the property, of course proceedings must be taken by ejectment, information or otherwise, and it may in some cases be expedient to direct an information to be filed, but the question whether there is a charity must be capable of being decided on the summons, or things would come to a deadlock.

Bowen, L.J.:—

I am of the same opinion, and think that the jurisdiction is clear. The judge must have jurisdiction to decide whether there is a charity or not, otherwise the proceedings would come to a stop if any one alleged that there was no charity.

The order of Mr. Justice *Kekewich* was discharged and it was directed that the further consideration of the summons should be before the Court of Appeal.

Solicitors for the Freemen: *Rye, Eyre & Co.*, for *J. Stanley, Norwich.*

Solicitors for the Attorney-General: *Hare & Co.*

Solicitors for the corporation of *Norwich*: *Sharpe, Parkers & Co.*, for *H. B. Miller, Norwich.*

H. C. J.

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Oct. 25, 26, 29; *Nov.* 10.

FRY *v.* LANE.

[1887 F. 781.]

In re FRY.
WHITTET *v.* BUSH.

[1887 F. 666.]

Unfair Dealing—Sale—Reversion—Under-value—Setting aside Sale— 31 *Vict. c.* 4 [*Revised Ed. Statutes, vol. xv., p.* 657]—*Costs.*

Where a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and *à fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving that the purchase was fair, just, and reasonable.

Sales of reversionary interests set aside, the vendors being poor, ignorant men, selling at a considerable under-value, and having no professional adviser other than the solicitor to the purchasers who gave to them a great advantage in the transactions.

There being no evidence of moral fraud on the part of the purchasers, and allegations of misconduct on their part having been made and not substantiated, no costs were given.

JOHN BROWN FRY, who died on the 11th of October, 1854, by his will, dated the 12th of September, 1854, left the residue of his property to trustees upon trust for his widow for life, *durante viduitate*, and upon her death or second marriage, subject to two legacies of £250 each, he gave the residue to such of the children (excepting one *Sarah*) of his late brother *George Fry* as should be then living, and the issue then living of any who were then dead, such issue taking their parent's share.

The testator's widow survived him and did not marry again. She died on the 17th of August, 1886.

The will was proved in January, 1855, and one of the legacies of £250 was satisfied by arrangement and released.

The property constituting the residue then consisted of £823 18*s.* 2*d.* consols, a freehold farm three or four miles from

Bristol, and a leasehold house in *Milk Street, Bristol*. The total net income produced was about £130 a year.

There were five children of the late *George Fry* who or whose issue became entitled, namely, *Mary Ann*, who predeceased the tenant for life, having two children, Mrs. *Brackstone* and Mrs. *Munns*, and *William Fry*, *John Brown Fry*, the younger (afterwards referred to as *J. B. Fry*), *Harriet Fry*, since deceased, and *George Fry*.

They were all poor persons in a humble position. *William Fry* was a workman in the employ of *Samuel Albert Lane*, who carried on business as a plumber at *Notting Hill*. *J. B. Fry* was a laundryman, earning £1 a week.

On the 19th of August, 1878 (nearly twenty-four years after the testator's death), *William Fry* and *Lane* called on *Oliver*, a solicitor who was then practising at *Queen's Road, Bayswater*, and who had been acting for *Lane* in winding-up the estate of *Lane's* mother, who had recently died. *Lane* took *William Fry* to *Oliver's* office. They had a copy of the will of the testator with them, and instructed *Oliver* to inquire of what the property consisted, with a view to raising money on the shares of *William* and *George*.

Thereupon *Oliver* wrote to Messrs. *Ray & Bush*, solicitors at *Bristol*, who had acted for the trustees of the testator's will, and on the 30th of August, 1878, Messrs. *Ray & Bush* wrote saying that the trustees of the will had died, and no new trustees had been appointed, and that the writer of the letter and another person were executors of the surviving trustee. The property was stated to consist of £823 18*s.* 2*d.* consols, and houses and land let at £110. No mention was made of the fact that one of the legacies of £250 had been satisfied.

On the 12th of September, 1878, *Lane*, *William Fry*, and his brother *George Fry*, attended at *Oliver's* office, and *Oliver* (who was called as a witness) stated that according to his recollection the correspondence was then read. He took retainers on that occasion from *William Fry* and *George Fry* to take proceedings for the appointment of new trustees, and for the administration of the testator's estate, and he stated that partly for this purpose he was instructed to obtain a loan on their shares.

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Oliver also stated that he had instructions from *J. B. Fry* to raise money on his share, that on the 16th of September, 1878, he wrote to three persons giving particulars, and that on the 17th of the same month he attended at the office of the *Law Reversionary Society* and talked the matter over with one of their officers. He also communicated with Mr. *Henry*, a young man who was then an articled clerk and was a friend of *Oliver*, and on the 19th he negotiated with some other persons.

In the meantime *William Fry* was arranging with *Lane* for the sale to him of the share of *J. B. Fry*, and *Lane* agreed to give £150 for it. *Lane* stated in evidence that he took the income to be £120, and calculated that at twenty years' purchase to be £2400, one-fifth of which would be £480; from this he deducted one-fifth of the two legacies of £250 supposed to be payable, *i.e.*, £100, leaving £380. Then, he said, there would be expenses of insurance, costs of realizing the property, and other contingencies, which he thought would much reduce the value.

On the 19th of September, 1878, *Lane* informed *Oliver* that he had agreed to buy *J. B. Fry's* share for £150, and instructed *Oliver* to go to *Bristol* and make further inquiries. On the following day *Oliver* wrote to Messrs. *Ray & Bush* that he would call on them, and on the 21st of September, *Lane* and *J. B. Fry* went to *Oliver's* office. *Oliver* prepared an agreement while they were waiting. He stated that he asked *J. B. Fry* whether he would have his own solicitor, or whether he (*Oliver*) should act for him. *J. B. Fry* asked what would be his charges, and *Oliver* said £10; and it was arranged that he was to act. *Oliver* stated that he then said to *Lane* he did not think £150 was a sufficient price. *Lane* answered he did not feel inclined to give more. *J. B. Fry* said, "What ought I to have?" *Oliver* said £200. *Lane* said he would not give it. Ultimately he agreed to give £170, out of which *Oliver's* costs for *J. B. Fry* were to be retained, so that *J. B. Fry* should get a clear £160. *Lane* had already advanced to *J. B. Fry* £5. The agreement drawn by *Oliver* was then signed, with a receipt for £5, on account of the purchase-money, in the margin.

On the 23rd of September, 1878, *Oliver* went to *Bristol*, and was engaged that day and the 24th investigating the nature of

the property, and on the 24th he learned that one of the legacies of £250 payable on the death of the tenant for life had been satisfied and released.

On the 26th of the same month *Oliver* saw *Lane*, *William Fry*, and *J. B. Fry*. He stated that he then told them of the result of his visit to *Bristol*, but he could not remember whether he told *J. B. Fry* that one of the legacies of £250 had been paid.

On the 27th of September, 1878, *Oliver* received a letter from *Ray & Bush*, in answer to an inquiry from him how much they would lend on two of the shares, offering to lend £400 on certain terms, one of which was that interest at 5 per cent. for three years was to be left in *Ray's* hands, and that his costs were to be £15.

On the 28th of the same month *Oliver* saw *William Fry* and his mother and discussed the matter with them. On the 4th of October, 1878, he drew the assignment of the share of *J. B. Fry* to *Lane*. The assignment contained no mention of the circumstance that one of the legacies of £250 was released.

On the 9th of October, 1878, a mortgage from *George Fry* to *Henry* for £200 was completed, and on that day *Oliver* received £156 10*s.* for *George Fry*, the balance being retained by the lender, *Henry*, for two years' interest at 9 per cent., and premiums of policy. On the same day a similar mortgage was made by *William Fry* to *Henry*. The mortgage of *George Fry's* share was prepared by *Henry's* own solicitors, Messrs. *Turner & Co.*, and approved by *Oliver*, who was acting for *George Fry*. It contained what *Oliver* called a very stringent power of sale without further notice on default in payment of principal or interest. *Henry* signed a contemporaneous memorandum agreeing to return part of the retained interest if the tenant for life should die within two years.

On the 11th of October *J. B. Fry* and *Lane* met at *Oliver's* office, and the assignment of *J. B. Fry's* share was executed. The purchase-money was paid to *Oliver*, except the £5 received by *J. B. Fry* at the date of the agreement, and a further sum of £5 10*s.* received by him afterwards, making £10 10*s.* The balance of the £160, viz. £149 10*s.*, was paid by *Oliver* to *J. B. Fry*; and

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Lane paid *Oliver* £10 more for *Fry's* costs, and afterwards £10 for his own.

Throughout these transactions the exact age of the tenant for life was not ascertained, but *William* and *George Fry* said that she was about the age of their mother, who was over seventy.

Oliver retained the moneys received from *Henry* for *George* and *William Fry*, doling out small sums to them from time to time. Under the retainer he had taken from them he presented a petition for the appointment of new trustees of the testator's will. This was apparently resisted by Messrs. *Ray & Bush*, but on what grounds did not appear. The result was that it was refused with costs, which, as *Oliver* stated, amounted to £97 11*s.*, and in respect of these costs he deducted £48 15*s.* 6*d.* from the mortgage moneys received by him for *George Fry*, and a like sum from those received on behalf of *William Fry*. He also deducted from *George Fry's* money the agreed costs of the mortgage, and *George Fry* received only £100 of the £156 10*s.* which *Henry* had paid to *Oliver* on account of the loan of £200.

By an order made in the Chancery Division on the 15th of April, 1879, *Edward Bush* and *Charles Harris Wood* were duly appointed trustees of the will of the testator.

In 1880 *George Fry*, being unable to keep down the interest on the £200, instructed *Oliver* to sell his reversionary interest. *Oliver* then applied to *James Whittet*, who was a client of his, and who in 1879 had lent money on mortgage of the shares of Mrs. *Brackstone* and Mrs. *Munns*, and asked him to buy *George's* share, but he declined. *Oliver* stated that the interest had been paid up to that time, so that he did not "bother" himself to effect a sale.

In November, 1881, and January, 1882, *Henry* was pressing for his interest, which had become in arrear, and *Oliver*, after communication with *George Fry* (as he stated, though there was no entry in his books confirming the statement), again applied to *Whittet* to purchase. He saw him and tried to get him to give £300. After some bargaining *Whittet* agreed to give £270. *Oliver* did not offer the share to any other person. He said that it never occurred to him to get an offer from one of the *London* companies—like the *Law Reversionary Society*—who buy this kind of property, nor was any valuation obtained.

On the 14th of February, 1882, the sale of *George Fry's* share was completed by an assignment by *Henry*, the mortgagee, and *George Fry* to *Whittet*. Of the purchase-money, £226 19*s.* 4*d.* was paid to the mortgagee and £10 10*s.* to *Oliver* for *George Fry's* costs of sale. *Oliver* paid to *George Fry* £26 10*s.*, and the rest he retained in satisfaction of a balance which he claimed for costs in the former transaction. *George Fry* thus received in cash only £126 10*s.* altogether in respect of his share upon the mortgage and sale.

In 1883 an action—*In re Fry's Estate; Munns* v. *Bush* (1883 F. 385)—was instituted by Mrs. *Munns* and her husband, and a daughter of *Harriet Fry* and her husband, for administration of the testator's estate, *Oliver* acting as solicitor for the Plaintiffs; but this action was stayed, the costs of the trustees coming out of the estate.

In September, 1885, *William Fry's* share was sold by the mortgagee at the *Auction Mart* in *London*, and was bought by *Whittet* for £330. The particulars of sale stated that the property was subject to legacies amounting to £500 payable on the death of the tenant for life, and were in other respects somewhat depreciatory. *Oliver* said that he told *Whittet* before this sale that one of the legacies had been paid, and *Whittet* bought with that knowledge, but the particulars did not seem to have been corrected.

Shortly before the death of the tenant for life on the 17th of August, 1886, as above stated, *George Fry*, at *Whittet's* request, attended at the office of an insurance company to insure his life again, the original policy having lapsed.

The property representing the residuary estate of the testator was sold out of Court and the proceeds paid into Court. The freeholds and leaseholds produced £3848. The consols, which had been reduced in amount (apparently by costs), produced £627 16*s.*, and there was a sum of £34 cash, making altogether £4509 16*s.* This having been diminished by payment of the legacy of £250 and other costs, the result was that there was now in Court £3651 6*s.* 10*d.* consols, which was not subject to any further deduction, except possibly for costs. One-fifth of this fund, supposing it not to be subject to any further costs, would be worth about £730.

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An actuary who had had large experience in the purchase of reversionary interests was called as a witness, and stated that in 1878 the contingent reversionary interest of *J. B. Fry* in £730 would be worth £475. This was not disputed: no counter evidence of value was given.

Fry v. *Lane* was an action brought by *J. B. Fry* against *Lane*, claiming that the assignment by *J. B. Fry* to *Lane* of his reversionary share and interest under the will might be set aside and delivered up to be cancelled. In that action *Lane* counter-claimed against *J. B. Fry* and *E. Bush* and *C. H. Wood* for administration of the residuary real and personal estate of the testator, and to have one-fifth thereof, or the investments representing the same, transferred or paid to *Lane*.

In re Fry, Whittet v. *Bush*, was an action by *Whittet* against *E. Bush, C. H. Wood, William Fry, George Fry,* Mrs. *Brackstone* and her husband, and Mrs. *Munns* and her husband, claiming to have the residuary real and personal estate of the testator administered. In that action *George Fry* counter-claimed against *Whittet* that the deed of the 17th of February, 1882, might be ordered to stand as security only for the sums actually paid by *Whittet* to *George Fry* or to *Henry* on his account, with interest.

The statement of claim in *Fry* v. *Lane* contained allegations of fraud on the part of *Lane*, and the defence and counter-claim of *George Fry* in *Whittet* v. *Bush* contained allegations of undue influence on the part of *Whittet*, and that he took undue advantage of the ignorance and needy circumstances of *George Fry*.

Sidney Woolf, and *Philip H. Clifford*, for *J. B. Fry*, the Plaintiff in *Fry* v. *Lane*, and *George Fry*, Defendant in *Whittet* v. *Bush*, and for other parties:—

These being sales of reversionary interests the onus in each case lies on the purchaser to prove that the price was fair and adequate. The law in this respect has not been altered by 31 Vict. c. 4; *Earl of Aylesford* v. *Morris* (1). The vendors were poor ignorant men who had no independent advice. *Oliver*, the solicitor for the purchasers, acted throughout in their interest rather than in that of the vendors.

(1) Law Rep. 8 Ch. 484.

[KAY, J., referred to *Harrison* v. *Guest* (1).]

That was not a case of a purchase of a reversion. In the case of a bargain with an expectant heir, the fact that he has had no independent advice is in itself evidence that the bargain was unfair: *O'Rorke* v. *Bolingbroke* (2). *Baker* v. *Monk* (3), and *Clark* v. *Malpas* (4), which were both decided after *Harrison* v. *Guest*, and *Wood* v. *Abrey* (5), *Haygarth* v. *Wearing* (6) and *Cragg* v. *Alexander* (7), are clear authorities that a purchase at an undervalue from a poor, ignorant, or illiterate person, having no independent advice, cannot be sustained. A very slight undervalue is ground for impeaching a sale: *Foster* v. *Roberts* (8); *Edwards* v. *Browne* (9); *Edwards* v. *Burt* (10).

Neville, Q.C., and *R. C. Dobbs*, for *S. A. Lane*, the Defendant in *Fry* v. *Lane*, and *J. Whittet*, the Plaintiff in *Whittet* v. *Bush*:—

The action of *Fry* v. *Lane* is based on fraud. Actual and positive fraud is distinctly alleged, but no evidence of fraud on the part of *Lane* is given. In neither case is there any evidence of anything amounting to unfair dealing on the part of the purchaser. Since the Act 31 Vict. c. 4, if the purchaser of a reversionary interest acts with perfect good faith, as *Lane* and *Whittet* did, the sale cannot be set aside merely on the ground of undervalue; unfair dealing must be shewn.

In the case of *Lane* the price was fixed before any solicitor was employed, and the employment of *Oliver* to act on *J. B. Fry's* behalf resulted in an increase of the price.

C. H. Turner, for Mr. and Mrs. *Munns*.

Renshaw, Q.C., and *E. Ford*, for the trustees of the will.

Sidney Woolf, and *Neville*, in reply.

KAY, J.:—I will reserve judgment. The point is one of very considerable importance.

(1) 8 H. L. C. 481.
(2) 2 App. Cas. 814.
(3) 4 D. J. & S. 388.
(4) 4 D. F. & J. 401.
(5) 3 Madd. 417.
(6) Law Rep. 12 Eq. 320.
(7) W. N. 1867, p. 305.
(8) 29 Beav. 467.
(9) 2 Coll. 100.
(10) 2 D. M. & G. 55.

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1888. Nov. 10. KAY, J. (stated the facts of the case as above detailed, and observed in the course of his statement that he must infer that on the 26th of September, 1878, *Oliver* did not inform *J. B. Fry* that one of the legacies of £250 had been paid, because it would have been *Oliver's* duty to advise *Fry* that the agreement had been made under a material mistake of fact, and to have insisted on an increase of price; moreover the deed of assignment, which had been prepared by *Oliver*, should have mentioned that one legacy was released; but it did not. His Lordship continued as follows):—

J. B. Fry and *George Fry* both claim in this litigation to set aside the sales of their respective shares. I reserved judgment that I might more carefully consider the facts of the case, and the law which is applicable to them since the passing of the statute 31 Vict. c. 4.

Long before the passing of that Act it was settled that the Court of Chancery would relieve against a sale of or other dealing with a remainder or reversion at an undervalue on that ground alone, and this even where the remainderman was of mature age and accustomed to business: *Wiseman* v. *Beake* (1); *Berkley-Freeman* v. *Bishop* (2); *Davis* v. *Duke of Marlborough* (3); *Earl of Portmore* v. *Taylor* (4); *Boothby* v. *Boothby* (5); *Foster* v. *Roberts* (6); *Beynon* v. *Cook* (7). In such cases it was held that the onus lay upon the purchaser to shew that he had given the "fair" value as it was called in *Earl of Aldborough* v. *Trye* (8), or "the market value": *Talbot* v. *Staniforth* (9).

By the 31 Vict. c. 4, reciting that it was expedient to amend the law as administered in Courts of Equity with respect to sales of reversions, it was enacted (by sect. 1) that "no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue," and by sect. 2 the word "purchase" in the Act is to include "every kind of contract,

(1) 2 Vern. 121.
(2) 2 Atk. 39.
(3) 2 Sw. 108, 143.
(4) 4 Sim. 182.
(5) 1 Mac. & G. 604; S.C. 15 Beav. 212.
(6) 29 Beav. 467.
(7) Law Rep. 10 Ch. 389.
(8) 7 Cl. & F. 436, 456.
(9) 1 J. & H. 484, 503.

conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired." This Act came into operation on the 1st day of January, 1868.

It is obvious that the words "merely on the ground of undervalue" do not include the case of an undervalue so gross as to amount of itself to evidence of fraud, and in *Earl of Aylesford* v. *Morris* (1) Lord *Selborne* said that this Act "leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord *Hardwicke*, raise 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud. Fraud," says Lord *Selborne*, "does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."

The most common case for the interference of a Court of Equity is that of an expectant heir, reversioner, or remainderman who is just of age, his youth being treated as an important circumstance. Another analogous case is where the vendor is a poor man with imperfect education, as in *Evans* v. *Llewellin* (2); *Haygarth* v. *Wearing* (3).

In the case of a poor man, in distress for money, a sale, even of property in possession, at an undervalue has been set aside in many cases, as in *Wood* v. *Abrey* (4), where the only professional person employed was the purchaser's attorney, and the price was one-fourth of the value, Sir *John Leach* saying: "A Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it

(1) Law Rep. 8 Ch. 484, 490.
(2) 1 Cox, 333.
(3) Law Rep. 12 Eq. 320.
(4) 3 Madd. 417, 423.

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will avoid the contract." So in *Longmate* v. *Ledger* (1) (which it seems, was affirmed on appeal) (2), where property in possession was sold for a price greatly below the value, and one solicitor acted for vendor and purchaser, and the vendor was a man advanced in years, and known to have been of a weak and eccentric disposition.

In *Clark* v. *Malpas* (3), an improvident sale of property in possession by a poor and illiterate man, the same solicitor being employed by both parties, was set aside. Again, the same thing was done in *Baker* v. *Monk* (4), where the vendor was an elderly woman in humble life, and the purchaser a substantial tradesman, whose solicitor carried out the transaction for both parties, the consideration being an annuity of 9*s.* a week for the life of the vendor. In that case *Turner*, L.J., distinguishes *Harrison* v. *Guest* (5)—a case in which the transaction was allowed to stand—on the ground that there the offer came first from the vendor, and the purchaser advised him to take time to consider and to consult some one else about it, no such advice having been given by the vendor in *Baker* v. *Monk*.

The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.

This will be done even in the case of property in possession, and *à fortiori* if the interest be reversionary.

The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord *Selborne's* words, that the purchase was "fair, just, and reasonable."

Upon the evidence before me I cannot hesitate to conclude that the price of £170 in *J. B. Fry's* case and £270 in *George Fry's* case were both considerably below the real value. The property has been subjected to the costs of appointing new trustees, and also to part of the costs of an administration suit,

(1) 2 Giff. 157.
(2) See 4 D. F. & J. 402.
(3) 4 D. F. & J. 401.
(4) 4 D. J. & S. 388.
(5) 8 H. L. C. 481.

and yet the net produce of one-fifth share is £730. Managed in a more careful manner it might have produced more.

Both *J. B. Fry* and his brother *George* were poor, ignorant men, to whom the temptation of the immediate possession of £100 would be very great. Neither of them in the transaction of the sale of his share, was, in the words of Sir *J. Leach*, "on equal terms" with the purchaser. Neither had independent advice. The solicitor who acted for both parties in each transaction seems, from the *Law List*, to have been admitted in March, 1877. In October, 1878, at the time of completing the sale of *J. B. Fry's* share, he had not been much more than a year and a-half on the roll. His inexperience probably in some degree accounts for his allowing himself to be put in the position of solicitor for both parties in such a case. I think in each transaction he must have been considering the purchaser's interest too much properly to guard that of the vendors. Nothing could be more obvious than to test the value by obtaining an offer from one or more of the leading offices in *London*, which deal in purchases of this kind. But, although when borrowing money for one of the beneficiaries, he did make some application to the *Law Reversionary Society*, he says it never occurred to him to do so when he had to effect a sale. He found it was easy to borrow £200 upon an interest of this kind before he completed the sale of *J. B. Fry's* share for £170. He does not seem even to have informed either of the vendors that one of the £250 legacies had been satisfied, and he allowed the sale by auction of *William's* share to proceed without correcting the inaccurate statement in the particulars that this legacy was still due, though he says that he informed *Whittet*, the intending purchaser of *William's* share, that the legacy had been discharged. I regret that I must come to the conclusion that, though there was a semblance of bargaining by the solicitor in each case, he did not properly protect the vendors, but gave a great advantage to the purchasers, who had been former clients, and for whom he was then acting. The circumstances illustrate the wisdom and necessity of the rule that a poor, ignorant man, selling an interest of this kind, should have independent advice, and that a purchase from him at an undervalue should be set aside, if he has not. The most experienced solicitor, acting for

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both sides, if he allows a sale at an undervalue, can hardly have duly performed his duty to the vendor. To act for both sides in such a case, and permit a sale at an undervalue, is a position in which no careful practitioner would allow himself to be placed.

No case of delay or acquiescence is made in the pleadings by either *Lane* or *Whittet*, but the point was nevertheless suggested in argument.

In *Gowland* v. *De Faria* (1) Sir *William Grant* in a like case said: "There is I believe no case, in which during the continuance of the same situation, in which the party entered into the contract, acquiescence has ever gone for anything: it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; that it is only when he is relieved from that distress that he can be expected to resist the performance of the contract." The same rule was applied in *Beynon* v. *Cook* (2), where the late Master of the Rolls, whose judgment was affirmed, says that the state of distress is considered to continue till the reversion falls into possession.

I have to consider what should be done with the costs of these two actions.

In *Fry* v. *Lane* there are charges of fraud on the part of the Defendant *Lane*, and in the defence of *George Fry* in *Whittet* v. *Bush* the allegations of misconduct on the part of *Whittet* go somewhat further, I think, than the evidence warrants. I am of opinion that no moral fraud has been proved in either case on the part of *Lane* or *Whittet*, but such transactions amount to unfair dealing, which equity considers a fraud, though I would rather the word were used only for moral delinquencies. I am glad to find that no absolute rule has been laid down by the Court in these cases. Sometimes where the only ground was undervalue the plaintiff has been relieved on payment of costs, as in *Twisleton* v. *Griffith* (3). In some cases no costs are given, as in *Bromley* v. *Smith* (4); sometimes the costs are thrown upon the defendant, as in *Nevill* v. *Snelling* (5).

(1) 17 Ves. 20, 25.
(2) Law Rep. 10 Ch. 389, 393.
(3) 1 P. Wms. 310.
(4) 26 Beav. 644, 676.
(5) 15 Ch. D. 679, 705.

It seems to me to be just in this case to give no costs to *Whittet*, *Lane*, *John Brown Fry*, or *George Fry*. *Bush* and *Wood*, the trustees, must have their costs as between solicitor and client out of the fund.

[His Lordship then dealt with the costs of other parties and indicated the mode of division of the fund in Court, directing that out of the one-fifth of *J. B. Fry* there should be paid to *Lane* the money which he gave for purchase of *J. B. Fry's* share, namely £170, together with interest upon the same at 4 per cent. per annum from the date of payment, and the residue of that fifth should be paid to *J. B. Fry*; and as to the one-fifth of *George Fry*, that £270 with interest at 4 per cent. should be paid out of it to *Whittet* and the rest to *George Fry*. His Lordship added that he did not think that *Lane* or *Whittet* were entitled to repayment of premiums of insurance or other money expended for their own benefit in transactions which were held by the Court to be improper: *Pennell* v. *Millar* (1); *Bromley* v. *Smith* (2).]

Solicitors: *Daubeny & Mead*; *Newman, Hays & Schmettau*; *Daubeny & Mead*, agents for *G. Bush & Bush, Bristol.*

C. C. M. D.

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[1887 W. 201.]

Bankruptcy — Composition — Annulment — Discharge of Surety — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 11—*Bankruptcy Rules*, 1886, *r.* 213.

Where under sect. 18, sub-sect. 11, of the *Bankruptcy Act*, 1883, an order is made adjudicating a debtor bankrupt and annulling a composition made by him with his creditors, a surety who has given security for payment of the composition is discharged from liability, and the security becomes void so far as relates to such liability.

ACTION claiming a declaration that an indenture dated the 8th of July, 1885, and made between the Plaintiff, *Clara Gertrude Walton*, of the first part, *Matthews Copplestone* of the second part, and the Defendant, *James Cook*, of the third part, was void,

(1) 23 Beav. 172. (2) 26 Beav. 641.

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or no longer of any effect, and delivery up of the same to the Plaintiff and, if necessary, a re-assurance to the Plaintiff of the property comprised therein.

On the 2nd of May, 1885, upon the petition of a creditor of *Copplestone*, filed in the County Court at *Bridgewater*, a receiving order was made under which the official receiver entered and took possession of the goods, chattels, and effects of *Copplestone*.

At the first meeting of the creditors of *Copplestone*, on the 16th of May, 1885, resolutions were passed for the acceptance of a composition of 20*s.* in the pound payable by four instalments, within three, six, nine and fifteen months, after the approval thereof by the Court. These resolutions were duly confirmed at the second meeting of creditors on the 29th of June, 1885.

The Plaintiff was a creditor of *Copplestone* for £960, and had proved against his estate for that sum.

The Plaintiff, at the request of *Copplestone*, agreed to secure the due payment of the composition, and to postpone her debt to those of the other creditors, and by the indenture of the 8th of July, 1885, in consideration of the creditors of *Copplestone* agreeing to give time for the payment of the composition, the Plaintiff and *Copplestone* jointly and severally covenanted with the Defendant to pay to him from time to time such sums of money as would pay and satisfy all the creditors of *Copplestone* at the time of filing the petition the composition of 20*s.* in the pound, and also such sums of money as the Defendant might require to enable him to pay, in priority to all other debts of *Copplestone*, all debts, and costs and expenses directed to be paid in the distribution of the property of a bankrupt under the *Bankruptcy Act*, 1883, and also to carry out the terms and conditions of the resolutions for a composition; and the Defendant, upon the receipt of the moneys so covenanted to be paid, was to stand possessed of the same, after payment of all debts and payments by the *Bankruptcy Act*, 1883, directed to be paid in priority in the distribution of the property of a bankrupt, and the costs and expenses, in trust for the creditors of *Copplestone* (the debt of the Plaintiff being postponed as therein provided) in proportion to their respective debts, and pay and divide the same amongst them accordingly; and the Plaintiff thereby conveyed and

assigned a certain reversionary interest and policies of assurance belonging to her (subject to a subsisting mortgage thereof) to the Defendant as trustee by way of mortgage to secure the payment of the composition and the due performance of the preceding covenants.

The deed contained a proviso that although, as between *Copplestone* and the Plaintiff, the Plaintiff was only a surety, yet as between her and the Defendant she should be considered as a principal debtor for all moneys intended to be thereby secured, so that she, her heirs, executors and administrators, should not be released by time being given to *Copplestone*, his heirs, executors, or administrators, or by any other variation in the provisions of the deed or the resolutions for a composition, or any other thing whatsoever whereby the Plaintiff, her heirs, executors or administrators as a surety or sureties only would have been so released. The Plaintiff further covenanted that she would not receive, demand, or seek to recover, either of or from *Copplestone* or his estate, or of or from the Defendant, her debt of £960, or the composition payable thereon until all the other creditors had been paid in full, and would not at any time thereafter make any claim or demand upon the Defendant in respect of the debt of £960, or any composition in respect thereof. There was a proviso that the deed was executed conditionally upon the approval of the Court being obtained to the composition, and that, in the event of such approval being refused, the deed should be void, and the mortgaged property be reconveyed to the Plaintiff.

On the 9th of July, 1885, an order was made sanctioning the composition.

On the 10th of June, 1886, an application was made by a creditor of *Copplestone* for an order adjudicating him bankrupt in consequence of his having failed to pay the first instalment of the composition; but this application was adjourned on *Copplestone* undertaking to pay £200 into Court on or before the 7th of July, 1886.

On the 8th of July, 1886, the £200 not having been paid into Court, it was ordered that *Copplestone* be adjudicated bankrupt, and that the composition approved by the Court on the 9th of July, 1885, be, and the same was thereby, annulled.

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The question was now argued whether the Plaintiff was discharged from liability as surety under the indenture of the 8th of July, 1885, and the security thereby given rendered void by reason of the annulment of the composition (1).

Renshaw, Q.C., and *Hadley*, for the Plaintiff:—

When the order was made annulling the composition, the liability of the Plaintiff determined. The composition having become a nullity, the security given by her as surety for payment of the composition also became a nullity. That this is the intention of the Act appears clearly from rule 213 of the Bankruptcy Rules, 1886, providing that upon the annulment the trustee under the composition shall hand over the property of the debtor to the trustee under the bankruptcy.

There is no authority upon the point. In *Glegg* v. *Gilbey* (2), under sect. 126 of the *Bankruptcy Act*, 1869, it was held that where a compounding debtor was adjudicated bankrupt, the liability of a surety for payment of the composition was not discharged, but that section does not provide for the annulment of the composition.

[They referred also to *Cooper* v. *Joel* (3).]

Ince, Q.C., *Herbert Reed*, and *Rowden*, for the Defendant:—

The security given by the Plaintiff enures for the benefit of the creditors of *Copplestone*, notwithstanding the annulment of the composition: *Glegg* v. *Gilbey*. The security was a "disposition duly made" and "thing duly done under or in pursuance of the composition" within sect. 18, sub-sect. 11, of the Act of 1883. The effect of the deed was to secure the composition

(1) By the *Bankruptcy Act*, 1883, sect. 18, sub-sect. 11, if default is made in payment of any instalment due in pursuance of the composition or scheme . . . . the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to any sale, disposition or payment duly made, or thing duly done under or in pursuance of the composition or scheme.

By the Bankruptcy Rules, 1886, rule 213, where a composition or scheme is annulled, the trustee under the composition or scheme shall pay over and account for to the trustee under the bankruptcy, any moneys or property of the debtor which have come to his hands.

(2) 2 Q. B. D. 6, 209.

(3) 1 D. F. & J. 240.

to the creditors in consideration of their giving time to the debtor, and during the time so given the position of parties may have been altered. The contention of the Plaintiff would lead to strange results. A surety would be released because an event had happened attributable to the default of the debtor to answer which the security of the surety was given. A friendly creditor by obtaining an order of adjudication against the debtor would be enabled to release the surety from liability. A surety who declined to pay when the debtor made default might, indirectly, derive a benefit from his own breach of contract.

KAY, J. (after stating the facts of the case, continued):—

Courts of Equity, and Courts of Law also, have always regarded the position of a surety as one to be carefully guarded. I have now to consider to what extent the suretyship of the Plaintiff has been affected by the annulment of the composition. [His Lordship referred to the section of the *Bankruptcy Act* and rule of Court above stated, and continued:—] It is quite obvious that the meaning of those provisions is that the composition is to be put an end to, and the provision in rule 213 shews that very clearly, because if the composition existed for any purpose, then the moneys of the bankrupt, which the trustee under the composition had in hand, and out of which he would be bound to pay the composition under which he was trustee, would not go to the trustee under the bankruptcy, that is, to be divided *pari passu*, not among the creditors under the composition deed, but the creditors in the bankruptcy, who might be a totally different class. The annulment might take place at any time after the composition had been agreed upon; the amount in the trustee's hands might be large or small; if the surety paid the composition or any part of it, or any sum to the trustee under the composition, she would have the ordinary right of a surety to stand in the position of the person for whom she was a surety, and to have handed over to her anything which was received from that person, and the order for the annulment of the composition makes that impossible, because it is expressly provided by rule 213 that any property belonging to the trustee under the composition is to be handed over to the trustee under the

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bankruptcy. The truth is that by the interposition of *vis major*, called into action, as it has been in this case, by a creditor under the composition, the whole composition is put an end to. Let me try the question by analogy. Suppose the composition were not, as is the case here, secured by a mortgage, but by some surety giving a bond or promissory note, is it possible that after the composition had been annulled the trustee under the composition could sue on the bond or note? What for? He would no longer have to pay the composition, because the composition was annulled, not *ipso facto* by the default in payment of the instalments of the composition, but by the order of the Court in bankruptcy made upon the application of the creditor. That order made it impossible to carry out the composition in any way. Therefore, it seems to me that this deed, so far as it relates to the liability of the Plaintiff as surety, ought to be set aside. There must be a declaration to that effect, and a memorandum of this judgment may be indorsed on the deed. The Defendant will have his costs, charges, and expenses (including his costs of this action) out of the property comprised in the deed.

Solicitors: *Walker & Whitfield*, for *A. W. Pearce, Southampton*; *Wood, Bird & Wood*, for *Reed & Cook, Bridgewater*.

C. C. M. D.

MAYOR, ALDERMEN, AND BURGESSES OF WEST HAM *v.* GRANT.

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[1887 W. 4596.]

Local Government — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 257 [*Revised Ed. Statutes, vol. xvii., p.* 602]—*Special Act—Street—Paving and other Expenses—Estimated Expenses—Charge on Property.*

By a special Act, which was to be read together with the *Public Health Act*, 1875, as one Act, a local authority were empowered to apportion the "estimated expenses" of sewering, paving, and other works in a street among frontagers, and recover the expenses so apportioned either before the work was commenced, during its progress, or after its completion, by action at law or summary proceedings, and if the actual expenses were less than the estimated sum the difference was to be paid to the frontagers who had paid such sum or whose property might have been "charged therewith :"—

Held, that the right conferred by sect. 257 of the *Public Health Act*, 1875, to charge the property of frontagers with expenses incurred was not, by virtue of the above provisions of the special Act, extended to estimated expenses.

PREVIOUSLY to the 9th of November, 1886, the *West Ham Local Board* was the urban sanitary authority for the local government district of *West Ham*, subject to the provisions of the *Public Health Act*, 1875, and the Acts amending the same, and to certain local Acts, including the *Local Board of Health for West Ham, Extension of Powers Act*, 1867 (30 Vict. c. lvi.)

By the last-mentioned Act, sect. 1, "this Act and the *Public Health Act*, 1848, as altered or amended or supplemented by the *Local Government Act*, 1858, the *Local Government Act* (1858) *Amendment Act*, 1861, the *Local Government Amendment Act*, 1863, or any other Act now in force amending such Acts, or any of them, or incorporated therewith, shall be construed together as one Act."

By sect. 30, "when the said board shall, under the provisions of the 69th section of the *Public Health Act*, 1848, have given notice in writing to the owners or occupiers of the premises fronting, adjoining or abutting on any street, or any part thereof, requiring them to sewer, level, pave, flag or channel such street, or any

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part thereof, and such notices, or any of them, have not been complied with, it shall be lawful for the board to direct their surveyor to apportion the estimated expenses of sewering, &c., such street, or the part or parts thereof requiring to be so sewered, &c., including the cost of paving the point at the intersection of streets, and all other incidental costs and charges, among the said owners or occupiers of the premises so fronting, adjoining or abutting on the said street, or such parts thereof so requiring to be sewered or otherwise made good as aforesaid, and such expenses so apportioned may be recoverable either before the work shall be commenced, during its progress, or after its completion, and the same may be recoverable from the present or any future owner, either by action at law or in a summary manner before a justice or justices of the peace, at the option of the said board."

By sect. 31, "where the actual cost of so sewering, &c., any such street as is mentioned in the preceding section shall exceed the estimated cost, the difference of cost shall be apportioned by the said surveyor among the said various owners, and shall be recoverable from them in the same manner as hereinbefore provided with respect to the recovery of the proportion of the estimated cost; but in case the actual expenses shall be less than such sum, the difference shall be paid by the local board to the owners of the houses or property who may have paid such sum, or whose houses or property may have been charged therewith."

By the *Public Health Act*, 1875, sect. 257, "where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

By sect. 313, "where in any Act . . . . any provisions of any of

the Sanitary Acts which are repealed by this Act are mentioned or referred to, such Act . . . . shall be read as if the provisions of this Act applicable to purposes the same as or similar to those of the repealed provisions were therein mentioned or referred to instead of such repealed provisions and were substituted for the same."

The Acts referred to in sect. 1 of the local Act above set out are included amongst the Sanitary Acts which are repealed by the *Public Health Act*, 1875.

The Defendant was the owner of a house and premises fronting, adjoining, or abutting on certain parts of two streets within the district of *West Ham*, called respectively *Frederick Road* and *Adamson Road*.

On the 14th of February, 1885, the board, by notice in writing, required the Defendant to sewer, &c., the parts of *Frederick Road* on which her premises fronted, adjoined, or abutted. On the 26th of August, 1885, a similar notice was given to her in respect to *Adamson Road*.

The notices were not complied with, and thereupon the board directed their surveyor to apportion the estimated expenses of sewering, &c., the streets, and all incidental costs and charges, among the owners of premises fronting, adjoining, or abutting thereon respectively. The apportionment was duly made, and the amounts apportioned to be paid by the Defendant were £8 5*s.* 4*d.* in respect of *Frederick Road*, and £26 7*s.* in respect of *Adamson Road*. Notices of apportionment were served on the Defendant, and demand for payment was made, but not complied with. Summary proceedings were taken to recover the amounts, and on the 12th of February, 1886, the magistrate of the district ordered the Defendant to pay the same to the board, and further ordered a levy by distress and sale of the Defendant's goods in default of payment. A minute of the order was served on the Defendant, but the money was not paid.

The board then resolved that the two sums should be made a charge on the Defendant's premises, and that proceedings should be taken to enforce the charge.

On the 9th of July, 1886, the district of *West Ham* was created a municipal borough, and by virtue of a charter and Acts of

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Parliament the borough so created was placed from and after the 9th of November, 1886, within the jurisdiction of the Plaintiffs acting by their council as sanitary authority, and the board was dissolved, and all their powers, rights, and duties were vested in the Plaintiffs.

On the 30th of December, 1887, the Plaintiffs brought this action, claiming (1) a declaration that they were entitled to a charge upon the Defendant's house and premises for the two sums of £8 5*s.* 4*d.* and £26 7*s.* with interest; and (2), a sale of the house and premises and payment to the Plaintiffs of the two sums and interest and costs of action, out of the proceeds.

The Plaintiffs did not allege that any work of sewering, &c., had been executed or any expenses actually incurred.

The action now came on for trial in default of defence, and the question argued was whether by virtue of sects. 30 and 31 of the local Act, read together with sect. 257 of the *Public Health Act*, 1875, the Plaintiffs were entitled to a charge on the Defendant's property in respect of estimated expenses, or whether such charge was available only in respect of expenses incurred.

Phipson, for the Plaintiffs:—

The local Act must be read together with the *Public Health Act*, 1875, as one Act, and so read confers on the Plaintiffs a right to a charge in respect of estimated expenses and not merely expenses incurred. This is clear from sect. 31 of the local Act, in which the words "may have been charged therewith," are unintelligible upon any other interpretation. The case is covered by the decision of the Court of Appeal in *Midland Railway Company* v. *Watton* (1) where Lord *Esher*, M.R., referring to sect. 30 of this particular local Act, said that the reasonable interpretation of that section was that the expenses of works intended to be done might be estimated, and such estimated expenses might be apportioned among the frontagers in the same manner as the expenses actually incurred were apportioned under sect. 150 of the *Public Health Act*, 1875, after the completion of the works.

[KAY, J.:—There was no decision to that effect in that case,

(1) 17 Q. B. D. 30.

and there was no question before the Court as to a charge upon property.]

The Defendant did not appear.

KAY, J.:—

In this case I have not the least doubt that if the Court were to make the order as asked it would in effect be repealing a provision of a public Act of Parliament. [His Lordship read sect. 257 of the *Public Health Act*, 1875, and continued:—] There is no doubt whatever that that means, as it says, that the expenses in respect of which a charge is given must have been actually incurred by the local authority. I need not pause to say what "expenses incurred" may possibly mean, or whether the term implies actual payment of the expenses or not, because, at the least, it means money which the authority may have paid or become liable to pay. I do not mean to give that as a definition; but it must mean that at the least. In the case before me expenses have not been incurred by the Plaintiffs; they have not, so far as appears, paid or become liable to pay any expenses, and yet they have brought this action in the Chancery Division asking that the estimated expenses of doing certain works, which expenses at present they have not incurred, should be made a charge upon the Defendant's property. I can only say that is not within the section of the general Act which I have just read. That section is carefully worded, and it is express that only expenses which have been incurred by the local authority are to be a charge.

Then it is said that there is a special Act which incorporates the general Act, and which, read together with the general Act, alters the section which I have read. To my mind it would be a most startling thing to say that a special Act could thus alter the meaning of a general Act like the *Public Health Act*. Speaking for myself, I should never hold that, unless the words of the special Act did, in express terms, alter the general Act, or unless I saw from the words, and could not help coming to the conclusion that the Legislature, in passing the special Act, meant, having regard to the locality and to the purposes for which the

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special Act was intended to provide, to alter the provisions of the general Act.

Now, so far as the special Act has been called to my attention, it contains no enactment of that kind. [His Lordship referred to sects. 1 and 30 of the Act, and continued:—] The section which I have last read does not say that "notwithstanding" the enactment contained in the general Act the estimated expenses shall be a charge on the premises in respect of which they are intended to be incurred, and not merely the expenses incurred. It leaves that out, and I suppose deliberately and designedly leaves it out. The other section which has been referred to is sect. 31. [His Lordship read it.] It is said I must infer from the concluding words of the section, "charged therewith," that the meaning of this Act was to do that which it does not express in terms, namely, to alter or extend the provisions of the *Public Health Act* by making not the actual, but the estimated expenses, a charge upon each house. All I can say is, that such a violent construction as that is one to which I should not be forced unless there were words a great deal more specific than those which I find here. Consider what the result would be. A local board might estimate the expenses, and then apportion them amongst the owners of certain houses. Those houses might be charged with the estimated expenses which might be recovered at any time before the work had been done. It might turn out that the estimated amount was twice as large, or very much larger, than it ought to have been, and an owner might find that, if the actual expenses only had been charged, he would have paid willingly, and that his house had been sold because he had not paid a sum twice as large, or very much larger, than he ought to have paid. It is monstrous to say that that can be the effect of the special Act in the absence of express words. I conceive that the Legislature deliberately intended not to make the estimated, but only the actual expenses a charge, and for this, amongst other very good reasons, namely that the scheme of all these Acts obviously is not to allow the local authority to proceed against the property itself until they have exhausted the other more simple remedies by summary proceedings or action. The summary proceedings or action at law are contemplated by the

special Act as the modes by which "estimated expenses" may be recovered even before the work is done, but the Act does not contemplate proceedings against the land, and recovering estimated expenses, by selling the land or house before the work is done.

It seems to me, therefore, that this action is misconceived, and must be dismissed with costs.

Solicitors: *Hillearys & Co.*; *H. I. Sydney.*

C. C. M. D.

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Dec. 6, 11.

CARDIGAN *v.* CURZON-HOWE.

[1869 C. 30.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 20, *sub-s.* 1, 2, *cl. ii.*; *s.* 21, *sub-s.* (*x.*); *ss.* 46, 50, *sub-s.* 3, *and s.* 53—*Sale by Tenant for Life—Capital Money—Mortgagees of Life Estate—Consent—Costs.*

The costs of obtaining the consent and concurrence of mortgagees of the life estate on a sale by the tenant for life are not costs "of or incidental to the exercise" of the statutory powers properly payable out of the capital money produced by the sale. *In re Beck* (1) not followed on this point.

Dictum of *North*, J., in *In re Sebright's Settled Estates* (2) considered.

ADJOURNED SUMMONS.

This was a summons for taxation taken out in the action of *Cardigan* v. *Curzon-Howe* (3), which raised the question whether, on a sale by a tenant for life in exercise of the statutory powers, the costs of the concurrence of certain mortgagees of the life estate were properly payable out of "capital money" produced by a sale as "costs, charges, and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions" of the *Settled Land Act*, 1882.

Lady *Cardigan*, the tenant for life of the settled estates, had incumbered her life interest by a series of mortgages, so that at the time of the sale, which had been made by her in the exercise of her statutory power, there were no less than seven sets of mortgagees. The purchasers had required the consent and concurrence of these mortgagees, which had been obtained, and the tenant for life now claimed the right to include the costs of these mortgagees, which were very considerable, with her own costs as costs of sale payable out of capital money. The mortgagees' costs were not merely the costs of executing the deeds of conveyance to the various purchasers, but included the costs of laying before the various mortgagees all such matters, such as valuations and surveys, as are usually submitted in such cases, to enable

(1) 24 Ch. D. 608.
(2) 33 Ch. D. 429, 438.
(3) Reported on another point under the Settled Land Act at 30 Ch. D. 531, where the limitations of the settlement are given.

them to determine whether they could consent or not to the proposed sale.

Whateley, for the first mortgagees, having conduct of the action, opened the summons, but took no part in the argument beyond asking for payment of the mortgagees' costs.

Byrne, Q.C., and *Fossett Lock*, for the tenant for life :—

The tenant for life exercising the statutory power sells, and by sect. 20 is empowered to convey the whole estate and interest, the subject of the settlement, but by sect. 50, sub-sect. 3, the rights of any person, being an assignee for value of the life interest, are not to be affected without his consent; therefore it was necessary to obtain the consent and concurrence of these mortgagees before a sale could be made of the whole estate, and the costs of obtaining this consent are costs properly incidental to the powers and provisions of the Act, within sect. 21, sub-sect. (*x*), and are payable out of capital money. A much more advantageous sale is made when the estate is sold, not merely a reversion, and the tenant for life, as trustee for all persons interested under sect. 53, has to consider this; under sect. 46, sub-sect. 6, the Court has full power and discretion to allow these costs out of capital money. In *In re Beck* (1) the costs occasioned by the concurrence in the sale of the mortgagees of a tenant for life were allowed. That is a decision directly in point.

Romer, Q.C., and *Nalder*, for the tenant in tail in remainder :—

These costs are not incidental to the exercise of the statutory power of sale. This is a matter between the tenant for life and her mortgagees; the Legislature never intended, while protecting the interests of assignees for value of the life estate, to throw the costs occasioned by the concurrence of a mortgagee of the life estate upon the capital moneys. In this case there are seven sets of mortgagees, many of whom may have sent down surveyors, and it is not simply a question of the costs of merely concurring in the conveyances. The tenant for life can sell without the consent of these mortgagees, though the result of doing so is to

(1) 24 Ch. D. 608.

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sell what is practically a reversion, not an estate in possession: *In re Sebright's Settled Estates* (1).

The question as to the costs of the concurrence of the mortgagees was not seriously argued in *In re Beck* (2).

Stallard, for the trustees.

Byrne, in reply, referred to *In re Llewellin* (3).

CHITTY, J.:—

This is a case unquestionably of some importance under the *Settled Land Act*, 1882. [His Lordship then stated the facts and the contention of the tenant for life, and continued:—] The only way to understand this Act of Parliament is to read it, and to read it with great care.

Now the 21st section of the Act, which deals with the application of capital money, mentions the various purposes to which the capital money may be applied or shall be applied; and the 10th sub-section is "in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act." That is the limit. The costs which may be claimed must be costs "of or incidental to the exercise" of one of the statutory powers or the execution of any of the provisions. By the 50th section a tenant for life is incapacitated from assigning or releasing his statutory powers: and any contract that is entered into by him not to exercise his powers under the Act is avoided. That is the effect of the first two sub-sections, but the third is in these words: "But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent," with an exception I need not read.

I can hardly conceive that the intention of the Legislature could have been expressed in clearer words than those. The section is to operate "without prejudice" to the rights of such an assign for value; and, in that case, the assignee's rights are

(1) 33 Ch. D. 429. (2) 24 Ch. D. 608.
(3) 37 Ch. D. 317.

not to be affected without his consent. I prefer to take the language of the Legislature and not to put any gloss on it whatever.

The mortgagee, therefore, of a tenant for life can consent or not consent, as he thinks fit; and, if he does consent, his consent is not given by virtue of any power conferred upon him by the Act of Parliament. It is simply because his rights are not prejudiced; and, consequently, he is left free by the Act of Parliament itself to give or withhold his consent.

That almost, if not quite, disposes of the whole question; because, as I have said, the 21st section speaks of costs incidental to the exercise of any of the powers of the Act. Putting those sections together, I think I am justified in saying that the result is, that as a rule the costs of the mortgagee of a tenant for life are not within the Act of Parliament.

But there are other sections that were referred to. Some observations were made in argument upon the effect of the 20th section. The argument on the 20th section and on other parts of the Act was, that a tenant for life selling sells the whole estate and interest within the settlement itself, and that therefore if he sells or attempts to sell without obtaining the consent of the mortgagee of his own life interest he is not making a sale within the Act. I cannot, as at present advised, assent to that proposition, because the section itself and the other parts of the Act confer upon him this power of sale, which however is not to prejudice his own mortgagees; it seems to me to follow almost in the words of the section that he may sell without prejudice to the rights of his own mortgagee. That is a sale, and it appears to me that that is a sale justified by the Act *primâ facie*. I am not bound to go into any minute discussion of what the effect of the 53rd section may be with reference to this point, or to express a final opinion whether the tenant for life in exercising this power of sale, if he sold without prejudice to the rights of his own mortgagees, would be selling having that regard, which he ought to have under the 53rd section, to the interest of other parties in the settlement, because unquestionably it, as in the case before me, the tenant for life has mortgaged, to use a common expression, up to the hilt, it comes very much in the

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result to what Mr. Justice *North* said in *In re Sebright's Settled Estates* (1): "When, therefore, his life estate is incumbered up to the hilt, he can only sell that which is practically a reversion, not an estate in possession." But I pass that by with this observation only, that I do not think it necessary that I should decide this point in order to arrive at a conclusion upon the actual question that is before me, nor am I concerned to say whether I should take identically the same view of the 20th section as was taken by Mr. Justice *North* in that case. This 20th section is a section which confers upon the tenant for life a power of conveying that which is not in him in point of law; a power of conveying all the interest in the settlement. To put it shortly and not read all the words of the Act (which are by no means unnecessary, though it is unnecessary for me to read them now at length) his conveyance operates to clear off from the land all the limitations in the settlement; and, to speak a little more exactly, it also clears off "all charges subsisting or to arise thereunder;" but in reference to this sub-sect. 2 of sect. 20 there are exceptions which are mentioned in the subsequent clauses to that sub-section, and the only one which I need mention is clause ii., which relates, by way of exception, to estates, interests, and charges conveyed or created for securing money actually raised at the date of the deed. Upon that Mr. Justice *North* appears to have come to the conclusion that the conveyance of the tenant for life would clear off all estates and interests created subsequently to the settlement for the purpose of securing money, and therefore would include a mortgage of his life interest made by the tenant for life for the purpose of raising money. As at present advised, it appears to me that it would be rather a strange result to hold that the tenant for life can sell only subject to the mortgage created by himself of his own life interest, or rather (to use the exact term again), without prejudice to that, and can at the same time convey his own mortgagee's estate. It is clear that he can convey the fee simple, if the fee simple is comprised in the settlement, but without prejudice to the mortgages on his own life estate; and it occurs to me it is open to reconsideration whether the exception in the 2nd sub-section,

(1) 33 Ch. D. 439.

clause ii., is anything more than an exception out of the words "estates, interests, and charges subsisting or to arise thereunder"—that is, under the settlement.

There is this point, which I think is worthy of observation. If a remainderman and tenant in fee mortgage, that is not a mortgage which subsists or arises under the settlement. The charge arises only because a person who has an interest under the settlement, as the holder of any other interest, can assign it or mortgage it; and, by parity of reasoning, I am disposed to think that that would also be the right view with reference to a mortgage created by the tenant for life mortgaging his own life interest. But that, again, would not be an estate, interest, or charge subsisting, arising, or to arise under the settlement; it would be a mortgage made by a man who is the owner of the life estate and is entitled to deal with it as he thinks fit.

I have mentioned these points in order to shew that I have not overlooked this part of the argument. If I acceded to Mr. *Byrne's* argument, there would be this extraordinary result; the tenant for life incumbering his own life estate would get, upon the sale, all the costs of his own mortgagees, but if, say the tenant in fee in remainder—by no means an uncommon case—had mortgaged, it is as clear as anything can be on this Act of Parliament that he, the owner of the inheritance, having mortgaged, if he made an application to his mortgagee to join, not one sixpence could be allowed with respect to those costs, except, of course, by some arrangement. It could not be allowed if the tenant for life refused to accede to it. Of course, in the case of a tenant for life and a remainderman in fee simple, they can come to any agreement they like.

Looking at this Act of Parliament as a whole, and having carefully analysed its provisions, I have come to the conclusion that the Legislature never meant to throw upon the inheritance—that is, the capital money produced by the sales—such a burthen as this, which has arisen, and may in many other cases arise, simply through the extravagance of the tenant for life.

I have dealt with the whole case; but I feel bound to mention *In re Beck* (1), which was before Vice-Chancellor *Bacon*. In that

(1) 24 Ch. D. 608.

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case, it does appear that the Vice-Chancellor allowed the costs of the mortgagees of the tenant for life; but there is no decision on that point, and it is just one of those matters which might pass without any great consideration; and, as far as I can see, it was a case rather of a friendly nature. Although the point was mentioned to the Vice-Chancellor, I cannot find any judgment of his which shews that his mind was drawn to the various parts of the Act bearing upon it. I think I am entitled, therefore, to say that that is not an authority for the point which has been fully argued before me.

The result is, that I decline to allow these mortgagees' costs; and, if it is a matter of discretion, then I certainly exercise my discretion adversely to this claim.

Solicitors: *Roopers & Whately; Walker & Mewburn Walker; A. R. & H. Steele; Warren, Gardner, & Murton.*

G. M.

POLLARD *v.* PHOTOGRAPHIC COMPANY.

NORTH, J.

1888

Nov. 30; *Dec.* 21.

[1888. P. 2755.]

Copyright—Photograph—Implied Contract—Breach of Faith—Injunction.

A photographer, who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also on the ground that such sale or exhibition was a breach of confidence.

THE Plaintiffs, a husband and wife, sued the Defendant, a photographer carrying on business at *Rochester* under the style of the *Photographic Company*. A claim was indorsed on the writ for an injunction to restrain the Defendant "from selling or offering for sale or exposing by way of advertisement or otherwise a certain photograph of the Plaintiff *Alice Morris Pollard* got up as a Christmas card, and from selling or exposing for sale or otherwise dealing with such photograph."

A motion was now made on the part of the Plaintiffs for an interim injunction in terms of the claim till the hearing. By arrangement the motion was treated as the trial.

Mrs. *Pollard* was photographed at the Defendant's shop at *Rochester* in August, 1888, and paid for likenesses of herself taken from negatives then made and for photographs of other members of her family. It was found by the Plaintiffs that a photographic likeness of Mrs. *Pollard* taken from one of the negatives, got up in the form of a Christmas card, was being exhibited in the Defendant's shop window at *Rochester*. A Mr. *Andrews*, a clerk of their solicitors, with a view to this action, purchased at the shop from Mr. *Bax*, the Defendant's manager, a copy of Mrs. *Pollard's* photograph made up as a Christmas card. Affidavits were made by Mr. *Andrews* and Mr. *Bax*, for the purpose of the motion, which conflicted as to the details of what passed on the occasion of the purchase. The result of the evidence is stated in the judgment. The Plaintiffs had not registered any copyright in the negative.

NORTH, J.

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Cozens-Hardy, Q.C., and *Silvester*, for the Plaintiffs:—

The Defendant was paid to take the negative for the particular purpose of supplying Mrs. *Pollard*; there is an implied contract not to use the negative for any other purpose, and he will be restrained from using the negative for any object that is obnoxious to the person who employed him.

[NORTH, J.:—Do you dispute that if the negative likeness were taken on the sly the person who took it might exhibit or sell copies?]

In that case there would be no contract or consideration to support a contract.

Emden, for the Defendant:—

The only contract that the photographer entered into was that he would supply copies to Mrs. *Pollard*, which contract he fulfilled. A person has no property in his own features: short of doing what is libellous or otherwise illegal there is no restriction on the photographer using his negative. There is no question here as to statutory copyright; no one is registered. *Nottage* v. *Jackson* (1) tends to shew that the Defendant is the person entitled to copyright if anybody is. The Court has no jurisdiction to grant an injunction where there is no injury done to property: *Emperor of Austria* v. *Day* (2); *Southey* v. *Sherwood* (3); *Clark* v. *Freeman* (4).

[NORTH, J.:—Injunctions have been granted to restrain a libel.]

They will only be granted in cases where there is injury to business or property: *Hermann Loog* v. *Bean* (5); *Saxby* v. *Easterbrook* (6); *Thorley's Cattle Food Company* v. *Massam* (7).

Cozens-Hardy, in reply.

(1) 11 Q. B. D. 627.
(2) 3 D. F. & J. 217.
(3) 2 Mer. 435.
(4) 11 Beav. 112.
(5) 26 Ch. D. 306.
(6) 3 C. P. D. 339.
(7) 14 Ch. D. 763.

1888. Dec. 21. NORTH, J. :—

In the month of August last the female Plaintiff called at the place of business in *Rochester* of the Defendant, a person who carries on business as, and is sued by the name of, the *Photographic Company*, and there had her photograph taken in various positions, and for this and for photographs taken of other members of her family she paid a sum of £7 10*s*. The evidence is silent as to what passed upon this occasion, and therefore I infer that the transaction was one of the ordinary kind, and that no special terms or conditions of any sort were agreed upon. In November last it came to the knowledge of the Plaintiffs that the Defendant was exhibiting in his shop window, apparently for the purpose of sale, one of the photographs of the female Plaintiff got up as a Christmas card. A copy of the photograph as originally taken and also the copy so exhibited in the window are now before me, and it appears that the former, which is what is commonly called a vignette, has been decorated by the addition thereto, above and below the figure, of scrolls of what I suppose are intended for leaves, with the superscription, also in leafy letters, of the words "A Merry Christmas and a Happy New Year." This step was taken by the Defendant without any license or consent from and without the knowledge of the Plaintiffs, who had never authorized the use of the photograph by the Defendant in any manner, much less its public exhibition or sale for profit as a Christmas card. They accordingly placed the matter in the hands of their solicitors, and a clerk of theirs, Mr. *Andrews*, subsequently called at the Defendant's shop and purchased the exhibit with the above words on. There is, as usual in such cases, a difference between Mr. *Andrews* on the one hand and the Defendant's manager, Mr. *Bax*, on the other, as to what took place on that occasion; but Mr. *Andrews* states, without being contradicted, that he saw the Christmas card photograph fully displayed in the window, that he went in and asked for a copy of the photograph of the female Plaintiff, that *Bax* opened a glass case on the counter and took out and offered him what *Bax* calls an ordinary copy, being one like that in the window, but with nothing written on it, and when asked what the price was, replied 2*s*., and that *Andrews* then asked for one like

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that exhibited in the window with the lettering on it. According to the evidence of *Andrews*, *Bax* then asked him whether he was a friend of the female plaintiff, and on receiving an affirmative reply continued that he could not otherwise have let him have it, and then took the copy out of the window and handed it to *Andrews*, and received the price of 2*s.* for it. *Bax's* story is that when asked for the photograph in the window he said it was not there for sale, but only as a specimen with the view to obtaining orders for photographs taken in a similar manner, but that *Andrews* pressed for it, and that *Bax* asked him three separate times whether he had the authority of the female Plaintiff to purchase it, and only sold the photograph to him upon his replying that he had such authority. *Andrews* positively denies that there was such or any conversation about an authority to purchase. *Andrews* also states that before leaving the shop he asked *Bax* whether he had any authority to sell such photographs, to which *Bax* replied, "Yes, to personal friends of Mrs. *Pollard*," and this is not denied by *Bax*, though I do not find anything in the evidence to justify his statement that he had such authority. I do not think it necessary to consider which version of the conversation is the more reliable or probable. The case may be disposed of upon the footing that the facts, so far as in contest, are as stated by the Defendant's witness, so that the matter stands thus: when the female Plaintiff's photograph was asked for a copy was at once produced from a case on the counter and offered for sale for 2*s.*, without any remark; it was only subsequently, when the copy in the window was asked for, that any conversation took place as to the right to sell it, and even as to this the Defendant claims to be justified in selling it to any person who alleges that he is a personal friend of the female Plaintiff or that he has her authority to purchase it, and *Bax* states that this is the usual custom of photographers. *Bax* also states in his affidavit that immediately after he was served with the writ he removed the Christmas card photograph from the window, and it has not since been exhibited. But it will be remembered that the copy purchased by *Andrews* on the 9th of November, had been taken away by him; and the copy removed when the writ was served on the 13th of November must have been another copy of the same photograph substituted

in the window for that sold to *Andrews*. And it is difficult to reconcile the fact that there were more copies than one made with the allegation that the one sold was not intended for sale, but merely as a specimen to invite orders for others to be taken in a similar manner.

The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say "express or implied," because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that a photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer: and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the

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customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

The principles upon which I rest my judgment are well known, and of familiar application; and, though I am not aware that any case has been decided as to the negative of a photograph, there are many analogous cases in the books. In *Murray* v. *Heath* (1) the owner of some drawings employed the defendant to engrave plates from them, and the defendant, having done so, struck off some impressions from the plates before handing them over, which impressions his assignees sold after his bankruptcy. An action was brought by the owner of the drawings, founded on the *Copyright Acts*, and also in trover for the prints so struck. The action failed on both these heads, but Lord *Tenterden* said, in the course of his judgment, "The engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract." And, again, a little further on, "As to the count in trover, that cannot be maintained unless the prints therein mentioned were the property of the plaintiff. But they were the property of *Heath*, who caused them to be taken from his own engraving, though he may be liable to an action for his breach of contract in not delivering all the prints so taken." Such contract was not express, but was implied from the nature of the employment. Again, the recent case of *Tuck* v. *Priester* (2) is very much in point. The plaintiffs were the unregistered owners of the copyright in a picture, and employed the defendant to make a certain number of copies for them. He did so, and he also made a number of other copies for himself, and offered them for sale in *England* at a lower price. The plaintiffs subsequently registered their copyright and then brought an action against the defendant for an injunction and for penalties and damages. The Lords Justices differed as to the application of the *Copyright Acts* to the case, but held unanimously that, independently of those Acts, the plaintiffs were entitled to an injunction and damages for breach of contract. Lord *Esher* said (3): "The plaintiffs entered into a written con-

(1) 1 B. & Ad. 804, 811. (2) 19 Q. B. D. 629. (3) 19 Q. B. D. 635, 638.

tract with the defendant by which the defendant undertook to make a specified number of copies of a picture which belonged to the plaintiffs, in order that the plaintiffs might be able to sell those copies for their own profit. The contract being a written one, it must be construed by the writing alone, and the plain, honest meaning of it was this, 'You are to make those copies for us, and then you are to return the picture to us, and you are not to make any other copies for your own benefit.' That term was implied as plainly as anything could be. Instead of doing this the defendant, after he had made the specified number of copies for the plaintiffs, made other copies of the picture for himself, with the intention of selling them for his own profit, and he sent a number of those copies to *England* with the intention of selling them there, and, what was worse, of selling them at a lower price than that at which the plaintiffs were selling theirs. That was a plain breach of contract, and under such circumstances I cannot doubt that, quite irrespectively of the Act of 1862, a Court of Equity would grant an injunction and damages against the defendant." The Master of the Rolls then stated his reasons for coming to the conclusion that an action would lie under the statute, and after doing so said: "The plaintiffs, therefore, are entitled under the general law, by reason of the defendants' breach of contract, and of the trust reposed in him, to an injunction and damages, and they are entitled to the same injunction and damages under the statute." Then Lord Justice *Lindley* says (1): "I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of

(1) 19 Q. B. D. 638.

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faith, and in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not." That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase "a gross breach of faith" used by Lord Justice *Lindley* in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof.

It may be said that in the present case the property in the glass negative is in the Defendant, and that he is only using his own property for a lawful purpose. But it is not a lawful purpose to employ it either in breach of faith, or in breach of contract. Again in *Murray* v. *Heath* (1), the plates were the property of the defendant, for they had not been delivered to or accepted by the plaintiff. So in the case of *Duke of Queensberry* v. *Shebbeare* (2) the defendant was restrained from publishing a work of the Earl of *Clarendon*, although a person had been expressly allowed by the owner to make and retain as his own a copy of the manuscript, which copy he had sold to the defendant. There too an agreement or condition was implied that the manuscript should not be published. Again, it is well known that a student may not publish a lecture to which he has been admitted, even though by his own skill he has taken a copy of it in shorthand; and the receiver of a letter may not publish it without the writer's consent, though the property in the paper and writing is in him; and many similar instances might be given.

It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labour; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the

(1) 1 B. & Ad. 804. (2) 2 Eden. 329.

law; for the Act of 25 & 26 Vict. c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

The result is that in the present case the copyright in the photograph is in one of the Plaintiffs. It is true, no doubt, that sect. 4 of the same Act provides that no proprietor of copyright shall be entitled to the benefit of the Act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female Plaintiff has not been registered that this Act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the Act cannot be enforced until after registration, this does not deprive the Plaintiffs of their common law right of action against the Defendant for his breach of contract and breach of faith. This is quite clear from the cases of *Morison* v. *Moat* (1), and *Tuck* v. *Priester* (2), already referred to, in which latter case the same Act of Parliament was in question.

But the counsel for the Defendant did not hesitate to contend boldly that no injunction could be granted in a case where there could be no injury to property in respect of which damages could be recovered in an action at law; and he alleged that this is such a case, and relied on such decisions as *Southey* v. *Sherwood* (3) and *Clark* v. *Freeman* (4). I have already pointed out why, in my opinion, this is not such a case; but, if it were, the alleged consequences would not follow. Supposing that the present photograph actually was, or that by manipulation of the negative or by the addition of the rest of the figure, or of a background, it was rendered, a libel upon the Plaintiffs, by exposing them, for instance, to contempt or ridicule, it is quite

(1) 9 Hare, 241.
(2) 19 Q. B. D. 629.
(3) 2 Mer. 435.
(4) 11 Beav. 112.

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clear that in such a case a Court of Law could give damages, and could also, ever since the passing of the *Common Law Procedure Act of* 1854, grant an injunction; and ever since the passing of the *Judicature Acts* each branch of the High Court has the same power. (See *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1).) The right to grant an injunction does not depend in any way on the existence of property as alleged; nor is it worth while to consider carefully the grounds upon which the old Court of Chancery used to interfere by injunction. But it is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that Court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence, as was pointed out by Lord *Cottenham* in *Prince Albert* v. *Strange* (2). For these reasons the Defendant is wholly in the wrong; and as he denies the jurisdiction of the Court, the injunction must go as a matter of course; and as the parties have agreed that this motion is to be treated as the trial of the action the injunction will be perpetual, and the Defendant must pay the costs of the action.

Solicitors for the Plaintiffs: *R. F. Hill & Co.*
Solicitors for the Defendant: *Hart & Winch.*

(1) 20 Ch. D. 501. (2) 1 Mac. & G. 25.

D. P.

DAVIS *v.* GALMOYE.

NORTH, J.

1889

Jan. 11.

[1880 D. 960.]

Practice—Attachment—Rules of Supreme Court, 1883, *Order* XLIV., *r.* 2.

An application for leave to issue a writ of attachment may be properly made in Chambers, and (subject to the rule that an order leading to imprisonment must be made by the Judge personally) may be dealt with by the Chief Clerk.

Davis v. *Galmoye* (1) explained.

MR. JUSTICE *NORTH* made an order in Chambers giving the Plaintiffs leave to issue a writ of attachment against the Defendant for contempt in not having paid money ordered to be paid into Court. The Defendant appealed, and his appeal was dismissed (1). The writ of attachment was now in the hands of the sheriff, but had not been executed. A motion was made on behalf of the Defendant that the execution of the writ might be suspended to give the Defendant further time to procure the money.

Oswald, for the motion:—

There are circumstances now before the Court and not before the Court on the former occasion, as to the position of the Defendant, which will incline the Court to leniency in giving further time. In the Court of Appeal it was laid down in this action (2) that as matter of practice applications of this sort involving the liberty of the subject ought properly to be made on motion, and an order to commit ought not to be made except in open Court. That is an additional reason why the Defendant should have the indulgence.

Upjohn, for the Plaintiffs, was not called upon.

NORTH, J. (after stating the circumstances under which leave was given to issue the writ of attachment, continued):—

Reference has been made to the report of the application in this case before the Court of Appeal (1); and it is said that the Court of Appeal laid down an absolute rule that applications for

(1) 39 Ch. D. 322. (2) 39 Ch. D. 323.

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attachment must always be made upon notice of motion in open Court. I need hardly say that if the Court of Appeal had laid down that absolute rule, I should do what it was my duty to do and follow their direction; but I do not so read that judgment; and it would be so unfortunate if there were such a rule, that unless the Court of Appeal clearly requires it I should not act in accordance with the supposed rule. It frequently happens that the mere issue of a summons for attachment suffices to procure obedience to the order, and nothing remains to be done except to direct payment of the costs. In other cases the proper mode of dealing with the summons is to give further time to comply with the order, or give some other direction not involving actual attachment: a step which is rarely necessary. Sometimes the summons is dismissed; with or without costs. In all these cases the Chief Clerk is perfectly competent to deal with the application, and can do it at far less expense than a motion in Court would cost. If an order for an attachment is necessary, the Chief Clerk cannot make that order, and the case must be brought before the Judge in person: who will, if he thinks it desirable, adjourn it to be heard in open Court. That is the practice in my Chambers, and I believe in those of the other Judges: and it was thus that the original application in this case came before me personally. If it were to be held that no application for attachment can be made by summons in Chambers, but that every such application must be made upon notice of motion, it would often happen that the person against whom the application is made would have to pay ten times as much costs as he has to pay under the existing practice. If the Court of Appeal had considered that there was no jurisdiction in Chambers, my order would have been reversed. All I find in the report is that Lord Justice *Cotton* thought that it was better for the application to be made in open Court; a view to which I am prepared to give full weight in considering whether a summons for an attachment should be adjourned into Court.

[His Lordship considered no ground had been shewn for suspending the attachment, and refused the motion.]

Solicitors: *Galmoye & Co.; Watson, Sons & Room.*

D. P.

THORN *v.* CITY RICE MILLS.

NORTH, J.
1889
Jan. 11, 12.

[1888 T. 2174.]

Condition—Debenture—Time and Place of Payment.

Where there is a condition for payment of a sum at a time and place certain, the condition is not broken by non-payment at the time unless the demand for payment is made at the specified place.

A principal sum payable at a future date and half-yearly interest was secured by debenture, subject to conditions, that if default for fourteen days should be made in payment of any interest the principal should be immediately payable; and that principal and interest should be paid at one of two places. A half-year's interest was not paid within fourteen days of the time stipulated for, but the creditor did not appear at either place at the time named for payment:—

Held, that the principal was not immediately payable.

THE Plaintiff was the registered holder of a debenture issued by the Defendant company to secure payment of £1500 on the 28th of May, 1890, with interest in the meantime at the rate of 3 per cent. per annum, payable half-yearly, on the 28th of May, and the 28th of November. The property of the company, including £1660 uncalled capital, was charged by the debenture with payment of principal and interest.

The debenture was issued subject to certain conditions indorsed thereon, of which the following were two:—

"1. If the company makes default for a period of fourteen days in payment of any interest hereby secured the principal moneys hereby secured shall immediately become payable."

"4. The principal moneys and interest hereby secured will be paid at the *Royal Exchange Bank, Limited*, No. 126, *Cannon Street, London*, or at the registered office of the company."

All interest that became due on the debenture down to and including the interest that became due on the 28th of April, 1888, had been paid; it had always been paid by cheques sent by the secretary of the Defendant company to the Plaintiff. But the interest due on the 28th of November, 1888, was not paid, the secretary had not sent a cheque for it, and the Plaintiff

NORTH, J.
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had made no demand for it either at the *Royal Exchange Bank* or the offices of the Defendant company; and the writ was issued on the 17th of December, 1888. The claim indorsed was for an account of what was due for principal and interest, payment, and in default foreclosure or sale, a receiver or manager, and an injunction.

The Plaintiff gave notice of motion for the appointment of a receiver of the assets of the Defendant company, a manager of its business, and an injunction to restrain them from parting with the assets till trial.

There was evidence on the part of the company that they had ample funds to meet their liabilities, that except the Plaintiff's debenture they had no liability except accruing rent and office expenses, which did not exceed £90. The secretary deposed that but for an oversight on his part a cheque would have been sent for the half-year's interest on or shortly after the 28th of November.

Cozens-Hardy, Q.C., and *E. B. Cooper*, for the Plaintiff:—

The condition for payment of interest within fourteen days has been broken, the principal is, therefore, immediately due. This is a case in which the mortgagee is entitled to the protection of a receiver; he does not now ask to have a manager appointed.

Napier Higgins, Q.C., and *Dunham*, for the Defendants:—

If the Plaintiff had applied at the proper place for payment, or notified that the interest had not been paid, he would have been paid; the Defendants have made no default.

Cozens-Hardy, in reply:—

It is the duty of a debtor to seek his creditor while the latter remains within the realm, and pay the money without request: *Addison* on Contracts (1).

[NORTH, J.:—That is where no place of payment is fixed.]

The proposition is laid down without qualification. The Defendants have accepted that view by sending a cheque on previous occasions.

(1) 8th Ed. p. 1192.

[NORTH, J.:—Before giving judgment I should like to look at the recent case of *Robey* v. *Snaefell Mining Company* (1).]

Jan. 12, 1889. NORTH, J. (after stating the facts, continued):—

The interest due not having been paid within fourteen days the creditor says the principal has become due. That is the only question, because the company have offered to pay the interest. The question is not whether there has been an omission to pay interest, but whether default has been made by the company within the meaning of the conditions; which is not necessarily the same thing as the omission to pay.

The proposition made on the part of the Plaintiff is that it is the duty of the debtor who has to pay money at a fixed time to find his creditor, provided the latter be in *England*, and pay him. I do not assent to that statement of the law so broadly put. If it were qualified by the exception I will mention, it would be right. In *Sheppard's* Touchstone (2), under the title Condition, I find this passage:—

"In cases where a place is set down for the doing of the thing contained in the condition, there it must always be done at that place, unless by some agreement made between the parties afterwards, another place be appointed; otherwise the condition is not performed, and the parties are not bound to attend in any other place. But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service, as to pay money, or any such like thing, the party that is to do it must, at his peril, seek out the person to whom it is to be done, if he be *infra regnum Angliæ;* but if he be not within the kingdom, he is not bound to seek him, and yet the condition is not broken. And if the thing to be done be either local, *i.e.*, such a thing as must be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like; in this case the thing must be done at that very place, and a tender of doing it in that place is a sufficient performance of the condition."

And then he gives illustrations which I need not stop to read.

(1) 20 Q. B. D. 152. (2) Page 136.

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The law is laid down in the same way in a recent text-book, to which I refer, not as an authority, but as a convenient compendium. It is stated in *Leake* on Contracts (1):—

"If no certain place be appointed in the contract for performance, and it require the presence of the promisee, it must, in general, be made or tendered to him, wherever he may be; subject to the condition in some cases of his appointing a proper place."

Now in the present case, in my opinion, a place is fixed for payment, and it comes under the exception. And there is this to be noticed, that there are two places named, and it is for the person to whom payment is to be made to fix the place at which he will be paid; until he has selected the place at which he will be paid there can be no default. In my opinion there having been no demand by the creditor at either place, no default has been made by the company.

The case of *Robey* v. *Snaefell Mining Company* (2) is merely an instance of the general rule where no place is fixed.

Solicitors for Plaintiff: *Saunders, Hawksford, Bennett & Co.*
Solicitors for Defendants: *Snell, Son & Greenip.*

(1) Page 852. (2) 20 Q. B. D. 152.

D. P.

In re WEST CUMBERLAND IRON AND STEEL COMPANY.

NORTH, J.
1889
Jan. 12.

Company—Winding-up—Resolution to wind up voluntarily—Appointment of Provisional Liquidator before Date of Resolution—Supervision Order—Date of Commencement of Winding-up—Companies Act, 1862 (25 & 26 *Vict.* c. 89), ss. 84, 130 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 231].

A petition was presented for the compulsory winding-up of a company, and the same day a provisional liquidator was appointed. Afterwards the company passed an extraordinary resolution to wind up voluntarily. When the petition came on to be heard, an order was made to continue the voluntary winding-up subject to the supervision of the Court:—

Held, that the winding-up commenced from the passing of the resolution, not from the appointment of the provisional liquidator, and that the Court had no power to alter the date of commencement.

In re Colonial Trusts Corporation (1) not followed.

PETITION by creditors for the winding-up of the above company by the Court. The petition was presented on the 1st of December, 1888. On the same day, on the motion of the petitioners, Mr. Justice *North* appointed a provisional liquidator.

On the 19th of December the company passed an extraordinary resolution to wind up voluntarily. The petition now came on to be heard. The company desired that the voluntary winding-up should be continued under the supervision of the Court.

Napier Higgins, Q.C., *Ingle Joyce*, and *Page*, for the Petitioners, asked that, if a supervision order was made, the Court would direct that the winding-up should be deemed to have commenced from the date of the appointment of the provisional liquidator, instead of from the date of the passing of the resolution. In *In re Colonial Trusts Corporation* (1) a provisional liquidator was appointed before a resolution to wind up the company voluntarily was passed. A supervision order was afterwards made, and, on the question arising what property of the company was subject to a charge in favour of debenture-holders, Sir *G. Jessel*, M.R., held that the charge affected the property of the company existing at the commencement of the winding-up, and that the winding-up

(1) 15 Ch. D. 465, 472.

NORTH, J.
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must be taken to have commenced at the date of the appointment of the provisional liquidator. And in *Buckley* on the Companies Acts (1) it is said that, if, in the interval between the presentation of a petition and the passing of the resolution to wind up voluntarily, a provisional liquidator is appointed, the date of his appointment is for some purposes the commencement of the winding-up.

In *In re Emperor Life Assurance Society* (2) no doubt Vice-Chancellor *Bacon* came to a different conclusion, holding that under similar circumstances the winding-up of the company did not commence until the passing of the resolution confirming the first resolution to wind-up voluntarily.

In *Weston's Case* (3), Sir *W. Page Wood*, L.J., said (4) that, when there is a petition for winding-up a company, "*and nothing more done*," and then resolutions are passed for a voluntary winding-up, and afterwards a supervision order is made on the petition, the winding-up commences at the date of the second resolution.

Cozens-Hardy, Q.C., and *Marcy*, for the company.

Everitt, Q.C., and *J. G. Wood*, for creditors.

Levett, for a creditor.

W. H. Jackson, for creditors and shareholders.

NORTH, J., made a supervision order. He held that the winding-up would commence from the date of the resolution, and that he had no power to alter the date of the commencement fixed by sect. 130 of the *Companies Act*, 1862.

Solicitors: *Rowcliffes, Rawle & Co.; Tucker & Lake; Helder & Roberts; Morse & Simpson.*

(1) 5th Ed. p. 300.
(2) 31 Ch. D. 78.
(3) Law Rep. 4 Ch. 20.
(4) Ibid. 25.

W. L. C.

In re QUEBRADA RAILWAY, LAND AND COPPER COMPANY.

NORTH, J.
1888
Dec. 17, 18.
1889
Jan. 19.

Company—Reduction of Capital—Confirmation by Court—Preference and Ordinary Shares—Resolution for Reduction of Ordinary Shares alone—Sufficiency of Notice to Shareholders—Discretion of Court—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11 [*Revised Ed. Statutes, vol. xv., pp.* 624, 625]—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3 [*Revised Ed. Statutes, vol. xviii. p.* 367].

The capital of a company consisted of 100,000 ordinary shares of £10 each, of which 80,659 had been issued and paid up in full, and 100,000 preference shares of £1 each, of which 37,518 had been issued and paid up in full. The preference shares were entitled to a preferential dividend of 10 per cent. per annum, but were not entitled to any preference in respect of capital. The company having lost paid-up capital to the extent of £80,659, a special resolution was passed that this loss should be written off by reducing the ordinary shares by the sum of £1 each. No reduction was to be made in the preference shares. The special resolution was carried by the unanimous vote of the shareholders who were present in person or by proxy at the first and second meetings respectively. At the first meeting about one-third in value of the shareholders were present in person or by proxy, and at the second meeting about one-fourth. The notices convening the meetings had stated exactly the resolution which it was intended to propose, but they did not call the attention of the shareholders to the fact that the result would be to throw the loss of capital exclusively on the ordinary shareholders. No ordinary shareholder had expressed any dissent from the resolution:—

Held, that, as by the existing constitution of the company the loss ought to be borne by all the shareholders rateably, and the effect of the resolution would be to alter the constitution of the company in this respect, and to throw the loss exclusively on the ordinary shareholders, the notices of the meetings were insufficient, and that, therefore, it would not be fair, as between the ordinary and preference shareholders, that the resolution should be confirmed by the Court.

After this decision a circular was sent to every shareholder fully explaining the matter, and stating the effect of the judgment. In reply to this circular 514 ordinary shareholders (the whole number being 621), whose capital amounted to £769,590, assented in writing to the resolution; 103 sent no reply; and the remaining four, who together held 188 shares, expressed their dissent. One of the four, who held sixty-two shares, afterwards withdrew his opposition. Notice that the petition would be brought on again for hearing was served on the dissentients, but none of them appeared:—

Held, that the resolution ought to be confirmed.

PETITION by the above company for the confirmation by the Court of a special resolution for the reduction of the capital of the company.

NORTH, J.

1889

In re QUEBRADA RAILWAY, LAND AND COPPER COMPANY.

The company was incorporated in June, 1883, its capital being £1,000,000, divided into 100,000 shares of £10 each. Of these shares 80,659 had been issued and had been paid up in full. The articles of association did not empower the company to reduce its capital. The articles contained a clause, 43, empowering the company from time to time by special resolution to increase its capital beyond £1,000,000 by the issue of new shares, "with such privileges and subject to such conditions as by such special resolution may be lawfully provided." In 1886 a special resolution was passed increasing the capital of the company by £100,000, divided into 100,000 shares of £1 each, "and that such shares shall carry the right to a preferential dividend thereon at the rate of 10 per cent. per annum, payable out of the amount available for division as profit in each year, before any dividend on the ordinary shares, and any deficiency in such preferential dividend in any year to be made good out of the profits of subsequent years, such shares not to be entitled to any further dividend beyond such preferential dividend." Of these preference shares 37,518 were issued and were paid up in full. In October, 1888, a special resolution was passed adding to the articles of association the following clause: "The company may from time to time by special resolution reduce its capital, and may subdivide the whole or any part of the shares comprising the capital of the company into shares of smaller amount." Previously to November, 1888, the company had lost paid-up capital to the extent of £80,659 and upwards, and in October and November, 1888, the following special resolution was unanimously passed and confirmed: "That the capital of the company shall be: (*a.*) 100,000 preference shares of £1 each, of which 37,518 shares have been already issued. (*b.*) But the capital of the company, as represented by its ordinary shares, shall be reduced as follows: instead of an authorized capital of £1,000,000, divided into 100,000 shares of £10 each, the ordinary share capital shall be £919,341, divided into 306,447 shares of £3 each, and in order to effectuate such reduction, and to cancel the capital which has been lost or is unrepresented by available assets, £1 per share shall be written off each of the 80,659 fully paid-up ordinary shares of £10 each which have been already issued and are now

outstanding, and in lieu thereof 241,977 fully paid-up ordinary shares of £3 each shall be issued to the present holders of the said £10 ordinary shares, in the proportion of three of such £3 shares for every such £10 share held by the shareholders respectively."

At the first meeting about one-third in value of the shareholders, and at the second meeting about one-fourth, were present in person or by proxy. The notices convening the meetings stated exactly the terms of the resolution which it was intended to propose (being that which was actually passed), but did not otherwise call the attention of the shareholders to the fact that the effect of the resolution would be to alter the constitution of the company by throwing the loss of capital exclusively on the ordinary shareholders, instead of its being borne by all the shareholders rateably.

Napier Higgins, Q.C., and *Stroud*, for the company:—

The question now raised is the converse of that which was decided in *In re Barrow Hæmatite Steel Company* (1). There it was held that the amount of the preference capital could be reduced, contrary to the wish of some of the preference shareholders, there being no special contract to the contrary, and there being nothing inequitable in what was proposed. In the present case the question is, whether the ordinary capital can be reduced, leaving the preference capital untouched. We say that there is power to do this, and in *In re Barrow Hæmatite Steel Company* (2) your Lordship expressed an opinion that the power to reduce capital might be applied to part of the shares only. Under the *Companies Act*, 1867, the Court has power to confirm such a reduction. Here the ordinary shareholders are not insisting on their extreme rights. The resolutions were passed unanimously, and the shareholders had full notice of what it was proposed to do. The resolutions were not *ultrà vires*, and therefore the actual assent of every shareholder was not necessary. The company could, by passing a special resolution, altering the original articles of association, have acquired the power to give the preference shareholders a preference as regards capital as well as

(1) 39 Ch. D. 582. (2) 39 Ch. D. 594.

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income. In *Hutton* v. *Scarborough Cliff Hotel Company* (1) Lord *Westbury* held that a company had no power at all to issue preference capital, unless it was authorized to do so by its memorandum of association, but that case has not been followed. The principle of the decisions in *Doman's Case* (2), and *In re Argus Life Assurance Company* (3), applies. When there is a statutory power to alter the constitution of the company every shareholder is bound by it. Sects. 50 and 51 of the *Companies Act*, 1862, enable the statutory majority of shareholders to alter the regulations of a company by a special resolution. The resolutions were passed *bonâ fide*, and the ordinary shareholders may well have thought that it would be for the advantage of the company that the preference capital should not be reduced, and that, as most of the loss was incurred before that capital was issued, it would not be fair to throw any part of the loss on it. The notices of the meetings told the shareholders exactly what it was proposed to do. There is nothing unjust or inequitable in it. The powers of a majority of shareholders are shewn by *Taunton* v. *Royal Insurance Company* (4); *In re London and Mercantile Discount Company* (5).

[NORTH, J., referred to *Henderson* v. *Bank of Australasia* (6).]

In the present case there is in effect the unanimous assent of all the ordinary shareholders. The principle of *In re Direct Spanish Telegraph Company* (7) and *In re Barrow Hæmatite Steel Company* (8) applies.

NORTH, J.:—

I should have been prepared to sanction the proposed reduction of capital if I had felt myself at liberty to do so. But I do not. It seems to me that the proposal that the whole burden of the loss which has been incurred shall be thrown upon the ordinary shareholders is not fair as between the two classes of shareholders. The preference shareholders have a preference as regards dividend, but they have no preference as regards capital. *Primâ*

(1) 4 D. J. & S. 672.
(2) 3 Ch. D. 21.
(3) 39 Ch. D. 571.
(4) 2 H. & M. 135.
(5) Law Rep. 1 Eq. 277.
(6) 40 Ch. D. 170.
(7) 34 Ch. D. 307.
(8) 39 Ch. D. 582.

facie, having regard to the memorandum and articles of association, all the shares ought to be reduced *pari passu*, that is, rateably, and that is not what it is proposed to do. The resolution, therefore, produces an inequality among shareholders who ought to share the loss equally. It is said that the matter has been brought before the shareholders, and that they have assented to the resolution. If all the ordinary shareholders had in fact assented to the resolution, with full knowledge of the effect of it, no injustice would be done to them. It is said that they have all in effect assented by reason of the resolutions having been unanimously passed at the meetings. At the first meeting only a small number of shareholders was present, but they held proxies for others to a considerable extent. Having regard to the form of the notices issued, I think it would not be fair to say that the persons who had given proxies were bound just as if they had been present at the meeting. But, even giving full effect to the proxies, less than one-third in value of the shareholders were represented at the meeting. At the second meeting the proportion was much less, only about one-fourth of the shareholders being represented on that occasion. It is said that all the shareholders had notice of the resolution which it was intended to propose, and that, as they did not choose to attend the meetings, they are bound by the unanimous vote of those who were present. On looking at the notices of the meetings I find that, though they stated exactly what it was proposed to do, they did not call the attention of the shareholders to what the effect of it would be, namely, that, whereas, by the existing constitution of the company, the loss which had been incurred ought to be borne by all the shareholders equally, it was proposed that the loss should be borne by one class of the shareholders (a large class, no doubt) to the exclusion of the others. Under these circumstances, I cannot hold that the attention of the shareholders was sufficiently called to the fact that the constitution of the company was being altered in this respect. I must hold that the two-thirds or three-fourths of the shareholders who were not present at the meetings had not sufficient notice of what it was proposed to do. Under the circumstances I do not think it would be fair or equitable to confirm the resolution. I may

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refer to the judgment of Mr. Justice *Kay* in *In re Direct Spanish Telegraph Company* (1). He said (2): "The power given to the Court by sect. 11 of the *Companies Act*, 1867, to confirm a resolution to reduce capital is a discretionary power—that is to say, the Court may exercise it either by confirming with or without conditions, or by declining to confirm on a full consideration of all the circumstances. One matter to be taken into account is whether the proposed scheme would work injustice between the different classes of the shareholders. I agree that if the Court should think that would be the effect, it would not be the function of the Court to impose conditions which would amount to an alteration of the scheme; but the proper course to take, if such an alteration should be requisite, would be simply to refuse to confirm the resolution, leaving it to the company to prepare a new scheme if they thought fit."

These observations appear to me to apply precisely to the present case. I cannot, therefore, confirm the resolution, nor can I direct any steps to be taken for calling a fresh meeting of the shareholders. I can only order the petition to stand over generally, with liberty to amend. I will dispense until further order with the use of the words "and reduced" as part of the name of the company.

Immediately after the above decision a printed circular, signed by the managing director of the company, was sent to each of the shareholders, fully explaining the matter, and in particular the effect of the judgment of Mr Justice *North*. The circular contained the following statements: "If the proposed reduction of £80,659 was distributed rateably over both ordinary and preference shares, instead of being confined to the former, the holders of the ordinary shares would contribute about one penny in the pound less than if they were to bear the whole burden alone. The matter, however, is one entirely for the ordinary shareholders, who, if they choose to object, are entitled to do so, and the directors, in that case, would, no doubt, be advised not to proceed with the application to the Court."

(1) 34 Ch. D. 307. (2) 34 Ch. D. 312.

With the circular was sent a printed form of assent to the confirmation of the resolution by the Court, for the signature of the shareholders. This form expressed the assent of the shareholder to the resolution for reduction, and added that he did "not require the loss represented by such reduction of capital to be borne rateably by the preference shareholders with the ordinary shareholders."

There were 621 ordinary shareholders, of these 514 (the nominal value of whose shares amounted to £769,590) signed the form of assent; 103 did not reply to the circular; and four, who together held 188 shares, expressed their dissent in writing. Of these four, one, who held sixty-two shares, afterwards withdrew his opposition.

Notice was served on the dissentients that the petition would come on again for hearing on the 19th of January.

Napier Higgins, Q.C., and *Stroud*, for the company.

None of the dissentient shareholders appeared.

NORTH, J., upon these new facts being proved, confirmed the resolution.

Solicitors: *H. Kimber & Co.*

W. L. C.

STIRLING, J.

1888

April 25, 26, 27; *May* 1.

In re BLUNDELL. BLUNDELL *v.* BLUNDELL.

[1884 B. 5337.]

Trustee, Payments made by, for Costs, to Solicitor—Breach of Trust—Claim to have the Moneys repaid to the Trust Estate—Constructive Trustee—Right of Trustee to employ Solicitor, Auctioneer, or Stockbroker, and to pay them out of Trust Estate.

In order that a solicitor of a trustee may be debarred from accepting payments out of the estate in respect of costs properly incurred, notice must be brought home to him that at the time when he accepted them the trustee had been guilty of a breach of trust, such as would preclude him from resorting to the trust estate for payment of costs.

A trustee allowed his solicitors to retain costs out of the trust estate. At the time the solicitors had notice that the trustee had committed a breach of trust in secretly buying for himself part of the trust estate. In an administration action the trustee made default in payment into Court of the balance found to have come to his hands:—

Held, that the solicitors could not be compelled to pay in the sums received by them out of the estate.

Adjourned summons.

Thomas Blundell, who died on the 14th of September, 1882, by his will, made on the 21st of April, 1882, after appointing *Timothy Harrington*, *Richard Berry*, and his son, *George Thomas Blundell*, the Defendant, his trustees and executors, devised and bequeathed all his real and personal estates to them upon trust, as to his businesses then carried on by him at the *London Copper and Brass Works*, *West India Docks*, *Limehouse*, and also at *Victoria Docks*, that his son (the Defendant) should have the option of purchasing the said businesses, and the leasehold premises upon which such businesses were carried on, and the stock in trade, plant, machinery, and other assets belonging to the said businesses at the time of his decease, at the price of £6000, upon the terms therein mentioned; such option to be declared in writing within the time mentioned; or that his son should, if he preferred it, be at liberty to purchase the same at a valuation to be made according to the instructions of the other executors: and as to all the residue of his estate and effects, including the

said businesses and the leasehold premises upon which the same were carried on, in case his said son should not elect to purchase the same, the trustees were to sell and convert the same into money, and after payment of the funeral and testamentary expenses, and debts and legacies therein mentioned, hold the proceeds of sale and conversion upon trust to divide them into moieties; and the testator bequeathed one moiety to his son (the Defendant) absolutely, and directed that the other moiety should be held upon trust for the benefit of his son *James Blundell's* children (the Plaintiffs). Power was given by the will to postpone the sale and conversion of the property, but there was none given to carry on the businesses.

The will was proved on the 22nd of November, 1882, by the Defendant alone.

George Thomas Blundell did not exercise the option to purchase, but continued to carry on the businesses until July, 1883, without making any attempt to sell the goodwill.

During the last years of the testator's life the businesses had been carried on at a loss. Messrs. *Bower, Cotton & Bower*, who had acted as solicitors for the testator, now acted for *George Thomas Blundell* in the execution of the trusts and in the management of the testator's estate, and they strongly advised him, in accordance with the opinion of counsel, that apart from the option of purchase contained in the will, he had no power either to purchase the property or to carry on the businesses without the leave of the Court, and that the proper course to take would be to commence an action for administration.

On the 31st of July, 1883, the lease of the premises, the plant, machinery, and the stock in trade of the testator's business—the *Phœnix Works*, which was referred to in the will as being carried on at *Victoria Docks*—were sold by Messrs. *Fuller, Horsey & Co.*, and on the 29th of August, 1883, they delivered their account to Messrs. *Bower, Cotton & Bower*, and it appeared therein that some part of the plant and machinery had been purchased by *George Thomas Blundell* for the sum of £217, but that it had not been paid. On the 12th of September, 1883, the leasehold premises situate at the *West India Docks*, and known as the *London Copper and Brass Works*, were put up for sale by auction

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by Messrs. *Fuller, Horsey & Co.* at a reserve price of £1000, but it was not obtained. They were sold immediately afterwards to *Ernest Tabernacle* for the sum of £750, and the office furniture on the premises was at the same time sold to him for a sum of £59. The premises were by deed duly assigned to the purchaser. On the 19th and 20th of September, 1883, the plant, machinery, and stock in trade on the premises at the *West India Docks* were put up for sale by auction by the same auctioneers, and part of the plant was purchased by *Ernest Tabernacle* for the sum of £1382 10*s.* He was a personal friend of *George Thomas Blundell*, and was, in fact, purchasing for him, and under an arrangement between them the premises purchased by *Ernest Tabernacle* were let on lease to *George Thomas Blundell* for a term of three years at a rent of £200 a year.

Messrs. *Bower, Cotton & Bower* acted as solicitors for both *George Thomas Blundell* and *Ernest Tabernacle* in the preparation of the deed of assignment to the latter, and of the lease from him to the former, and both documents bore date the 15th of October, 1883.

George Thomas Blundell continued, without any cessation, in the possession of the premises, and of the plant, machinery, and stock in trade, which had been purchased by *Ernest Tabernacle*; and he also paid the ground rents, carried on the testator's business, and paid the interest on a sum of £600 which was advanced by Mrs. *Tingey* to *Ernest Tabernacle* on a mortgage of the premises.

On the 17th of October, 1883, the auctioneers sent in to Messrs. *Bower, Cotton & Bower* the accounts of the sales of the premises at the *West India Docks*, and of the plant thereon, with a cheque for the sum of £79 15*s.* 2*d.*, which were all the purchase-moneys then paid for the plant. In the latter account there was an item "To amount purchased by Mr. *Blundell's* agents, £1382 10*s.*"

Messrs. *Bower, Cotton & Bower* on the 19th of October, 1883, wrote a letter to *George Thomas Blundell*, in which, after expressing surprise at finding the item in the account, said in reference to it, "We cannot but think there is some mistake as to this, after the repeated cautions and warnings we have given to you that you could not purchase either by yourself or agents, and we should like to have some explanation of the matter." The

correspondence which ensued shewed that from that time forward Messrs. *Bower, Cotton & Bower* knew, or had strong grounds for suspecting, that *George Thomas Blundell* had bought the testator's business for himself.

On the 16th of September, 1884, *George Thomas Blundell* gave a charge to Messrs. *Bower, Cotton & Bower* upon property situate at *Tottenham*, part of the testator's estate, which was then contracted to be sold, for all the costs as to the testator's estate, and authorized them to deduct the amount from the purchase-moneys. The sale of the estate was shortly afterwards completed, and Messrs. *Bower, Cotton & Bower* retained the sum of £807 out of the purchase-moneys for their costs. In November, 1884, a friendly action was brought for the administration of the testator's estate, and on the 28th of that month an order was made directing the usual accounts and inquiries. On the 30th of January, 1885, an order was made giving the conduct of the action to the *Bavarian Brewery Company, Limited*, who were creditors of the estate to a large amount. From January to April, 1885, Messrs. *Bower, Cotton & Bower* were engaged in the preparation of the accounts required to be delivered by the order made on the 28th of November, 1884, and in preparing them it appeared that a sum of £534 13*s.* 8*d.* was still owing to the estate out of the purchase-moneys for the plant of the premises situate at the *West India Docks*. In a letter from Messrs. *Bower, Cotton & Bower* to *George Thomas Blundell*, dated the 18th of March, 1885, they said, "As regards the balance of £534 13*s.* 8*d.* due from *Fuller & Horsey* on their account we do not see how we can treat it otherwise than put it as a payment made to them, and received by you from them." The suggestion was acted upon by *George Thomas Blundell*, who sent his clerk to Messrs. *Fuller & Horsey* with their original account and got it altered in that manner.

At that time most of the testator's estate had been sold, and shortly before the accounts were completed, Messrs. *Bower, Cotton & Bower* delivered to *George Thomas Blundell* several bills of costs amounting to over a total of £1000 in respect of the management of the testator's affairs. Of that amount the sum of £710 was payable in respect of an action brought against the testator's estate, and a further sum was payable in respect of

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another action. The balance of £284 was in respect of the testator's estate generally. The accounts were in April, 1885, carried in, and they shewed a balance due to *George Thomas Blundell*.

On the 10th of September, 1885, an order was, in the action, made for the appointment of a receiver and manager, and he took possession of the business which had theretofore been carried on by *George Thomas Blundell*, who on the 10th of June, 1886, was adjudicated a bankrupt. The Chief Clerk's certificate, filed on the 23rd of February, 1887, shewed that a balance was due from *George Thomas Blundell* on the personal estate account amounting to the sum of £2496 12*s.* 10*d.*

Messrs. *Bower, Cotton & Bower* had received out of the testator's estate for their costs sums amounting altogether to over £1148, but with the exception of the sum of £807, which they had retained out of the proceeds of the sale of the estate at *Tottenham*, there was no evidence to shew that they had any knowledge that the moneys were paid out of the testator's estate.

The summons, which now came on to be heard, was taken out by the *Bavarian Brewery Company, Limited*, asking that Messrs. *Bower, Cotton & Bower*, solicitors, or one of them, might be ordered to pay into Court to the credit of the action various sums amounting in the aggregate to £1148 14*s.* 9*d.*—moneys received or retained by them, or which had otherwise come to their hands on account of costs in relation to the estate of *Thomas Blundell*, deceased.

W. F. Robinson, Q.C., and *E. Ford*, for the company's summons:—

The solicitors allowed the executor to commit breaches of trust, and they obtained payment of moneys which formed part of the trust estate. They are therefore liable as trustees to the estate: *Morgan* v. *Stephens* (1).

A solicitor who is employed by a trustee or executor in the execution of the trusts must look to the trustee or executor for the payment of his costs, and he has no right to make any claim upon the trust estate. Indirectly he may obtain the benefit of

(1) 3 Giff. 226.

the trustee or executor's right to be indemnified by the estate, but he cannot stand in any better position than the trustee or executor himself. Where it turns out that a trustee has committed breaches of trust, causing thereby a loss to the estate, the moneys received by the solicitor from the trustee should be ordered to be repaid by him. The solicitors in this case must have known that the trustee for whom they acted had been guilty of breaches of trust before they were paid their bills of costs. They took those moneys upon their own responsibility that the trustee was personally liable, and knowing that the Court might disallow the payments and order them to refund the sums to the trust estate: *Staniar* v. *Evans* (1).

Buckley, Q.C., and *Levett*, for the solicitors:—

A trustee has a right to employ a solicitor in the execution of the trusts, and he has also a right to resort to the trust funds to pay the costs of the solicitor so employed. The mere fact that the solicitors were paid their costs, which were properly incurred, out of the trust fund, and that the trustee turned out to be a defaulter, is not a reason for making them refund the sums which they received. There is no evidence that anything was done by the solicitors which could make them constructive trustees, or make them liable to refund the moneys because they might have had some suspicion, after the costs were incurred, that the trustee had committed a breach of trust. It is clear that the trustee disregarded the advice of the solicitors: *Barnes* v. *Addy* (2); *Maw* v. *Pearson* (3); *Harries* v. *Rees* (4).

[STIRLING, J., referred to *In re Spencer* (5), and to *Keane* v. *Robarts* (6).]

There is no difference between a solicitor a surveyor, an auctioneer, or any other agent. The case of *Staniar* v. *Evans* is not an authority in this case, as it merely decided that there is no lien on a trust estate for the costs of a solicitor. There was no agreement there that the moneys received by the solicitor should be appropriated for costs.

(1) 34 Ch. D. 470.
(2) Law Rep. 9 Ch. 244.
(3) 24 Beav. 196.
(4) 37 L. J. (Ch.) 102.
(5) 51 L. J. (Ch.) 271.
(6) 4 Madd. 332.

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Robinson, in reply, referred to the case of *Harmer* v. *Harris* (1).

STIRLING, J. :—

This case has been argued at considerable length, and it certainly involves a question which is of great importance, not only to solicitors, but to all other persons who are employed by trustees to assist them in the discharge of their duties. The case which was put is this:—An executor and trustee employed a solicitor to assist him in winding up an estate, and in the execution of the trust. I assume—it is not disputed in the present case—that the employment of the solicitor was proper. In the course of the employment the solicitor required the trustee to make payments to him on account of his costs. The trustee with the knowledge of the solicitor made the payments out of the trust estate. It was said that the solicitor cannot be paid sums out of the trust estate, except upon the terms that if the trustee, on the accounts being taken, turns out to be a defaulter, and an order be made against him for the payment of the balance into Court, and he fails to comply with it, the solicitor will be liable to have a similar order made against him. That is a very serious proposition in regard to a solicitor dealing with a trustee. It seems to me that if it be well founded in principle it cannot be confined to solicitors, but must be extended to other persons who are agents, such as auctioneers and stockbrokers, who, as is well known, are necessarily employed by trustees, and are in the habit of deducting out of the proceeds of sales of property which they are employed to sell their commission upon the sales. The first question which I have to consider is whether that be a true statement of the law. What is the position of a trustee or executor who has to employ a solicitor, an auctioneer, or a stockbroker? He enters, unquestionably, into a contract, with reference to the employment of a solicitor, or an auctioneer, or a stockbroker, on which he is personally liable, but by law he is entitled to be indemnified out of the trust estate. What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made the necessary payments to his solicitor, or to the auctioneer, or to the

(1) 1 Russ. 155.

stockbroker—but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability. That has been repeatedly decided. For example, a trustee in whose name shares in a company are standing is entitled to be indemnified by his *cestui que trust* against the payment of calls made upon the shares, and he is not bound before having recourse to the indemnity to pay the calls, but he is entitled to come to the Court, and ask that he may be paid by his *cestui que trust* personally the amount of the calls in order that he may be able to pay them. That equity has been repeatedly enforced by the Court. I may refer to the well-known case of *Cruse* v. *Paine* (1), which was decided by Sir *G. M. Giffard* when Vice-Chancellor, and on appeal by the Lord Chancellor, Lord *Hatherley*; and the same doctrine was laid down by the late Master of the Rolls, Sir *George Jessel*, and applied under peculiar circumstances, in the case of *Lacey* v. *Hill* (2), where the question arose in the administration of the estate of Sir *Robert Harvey*. It seems to me, therefore, that a trustee has a right to resort in the first instance to the trust estate to enable him to make the necessary payments to the persons whom he employs to assist him in the administration of the trust estate; that he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he can properly in the first instance resort to the trust estate, and pay those persons whom he has properly employed the proper remuneration out of the trust estate. I think that that is in accordance with *Barnes* v. *Addy* (3). In that case it appears from Lord *Selborne's* judgment that one of the trustees, who was made a defendant, paid, out of the trust estate, to his solicitor, a sum of £65, and it was sought to charge the solicitor with that sum. Lord *Selborne* said (4): "It is said he is to be charged with that (though he did not retain or use for his own benefit a single shilling of that money)." That, no doubt, is a distinction between that case and this; but, still, what Lord *Selborne* said there is none the less applicable to this case. "It is said he is to be charged with that (though he did not retain or use for his own

(1) Law Rep. 6 Eq. 641; Law Rep. 4 Ch. 441.
(2) Law Rep. 18 Eq. 182.
(3) Ibid. 9 Ch. 244.
(4) Law Rep. 9 Ch. 254.

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benefit one shilling of that money (1)), because the authority of the trustees to apply that money in the payment of certain costs of a previous suit, which had been compromised, was not obtained from this Court. Now the trustee, Mr. *Addy*, was, as I have said, at that time, beyond question, the legal owner of the fund. He and Mr. *Clark*, the deceased trustee, had a right, by the terms of the will, to be indemnified against all costs properly or reasonably incurred in connection with the trust. These costs have been incurred in a suit brought against them in the name of the present plaintiffs, the *Barnes* children, by a next friend under the advice of Mr. *Parker*, the family solicitor, which suit, having proceeded to a certain extent, had been compromised on the terms that all the three shares of this fund, the *Barlow* share, the *Barnes* share, and the *Addy* share, should bear their proportion of the trustees' costs. The trustee, *Addy*, authorized the sale for that purpose and that application of the money, and it was so applied; and I am most clearly of opinion, first of all, that there is nothing before us to shew that such an application was improper on the part of Mr. *Addy*, the trustee." Then his Lordship added: "But, secondly, that if it had been, the solicitor could not possibly have been held on that account responsible." The ground on which the solicitor could not have been held to be responsible appears to be that he simply acted as agent for the trustee; he did not retain the money for his own use, but simply handed it over in payment of the costs which had been incurred. Lord *Selborne* appears to hold that such an application of the fund was not improper on the part of Mr. *Addy*, and that he having properly incurred expenses in the administration of the trust fund, was entitled to sell part of the trust estate, and apply the proceeds directly in payment of the costs. If it was proper for the trustee to resort to the trust fund in payment of the costs, and to sell a part of the trust estate and apply the proceeds in payment of the costs, how could it be improper for the solicitor to receive the moneys? I fail to see how it could be. To say that his right to receive and retain them could be affected by the subsequent conduct of the trustee appears to me to be a proposition for which there is no authority.

(1) Law Rep. 9 Ch. 255.

The only authority cited in support of the proposition, namely, that of *Staniar* v. *Evans* (1), is a totally different case. From the decision there, as I understand it, I do not at all differ. As I read that case it was this: There was a suit instituted for the execution of the trust, and by the Chief Clerk's certificate it was found that there was in the hands of the trustee a balance of £1500 odd, including a sum of £660. The sum of £660 consisted of some mortgage debts which had been paid to the trustee's solicitors, together with interest, and it remained in the hands of the trustee's solicitors; but there had been no agreement between the trustee and the solicitors that the fund which had come to their hands should in any way be appropriated to the payment of costs. Then it was further proved that the trustee was, with the knowledge of the solicitors, utterly impecunious at the time the order was made for payment into Court, and that there was no probability of his being able to pay in any sum whatever. Mr. Justice *North* in that case held that the solicitors were liable to pay into Court the sum which they had retained in their hands, though a large sum was due to them from the trustee for costs; and the ground upon which his Lordship put it appears to me to be undeniable, viz., that solicitors cannot contract with the estate; they have no lien on the estate; they can only get a lien by means of some proper agreement with the trustee. There had been no agreement whatever entered into. The trustee himself was a defaulter; he was unable to make any payment; he could not in any way resort to the trust estate for the payment of his costs, because he had already in his hands a large sum which he ought to have applied in the payment of the costs, and Mr. Justice *North* held that under the circumstances the solicitors could stand in no better position than the trustee. I confess that I cannot see how that decision can be quarrelled with in any way; but it was not, to my mind, a decision that in every case in which the solicitor of a trustee receives moneys in payment of costs out of the trust estate, he can stand in no better position than the trustee himself does.

Having come to the conclusion that in a proper case a trustee may pay costs properly incurred to his solicitor out of the trust

(1) 34 Ch. D. 470.

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estate, I have next to consider whether if he makes such a payment improperly there are any circumstances, and if so, what circumstances, under which a solicitor may retain trust funds which he has so received. In regard to that, the case of *Barnes* v. *Addy* (1) is again valuable. There Lord *Selborne* said (2): "Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees." That doctrine so laid down by Lord *Selborne* has been expressly applied to solicitors by the Court of Appeal in the case of *In re Spencer* (3). There the action was brought by a *cestui que trust* against trustees for administration, the solicitors of the trustees being joined as defendants. It was alleged that grossly exorbitant sums had been allowed in the account as costs to the trustees' solicitors, and the relief asked, as against them, was that their bills should be taxed. The solicitors demurred, and it was held that such an action could not be maintained by the *cestui que trust* against solicitors, and that the proper remedy was by an application under the *Solicitors Act*, 1843. Lord Justice *Baggallay* said: "Are Messrs. *Ansdell & Son* liable to the plaintiff in any other character than as solicitors? The principle on which agents can be made responsible as constructive trustees is very clearly defined by Lord *Selborne* in the case of *Barnes* v. *Addy*."

(1) Law Rep. 9 Ch. 244. (2) Law Rep. 9 Ch. 251.
(3) 51 L. J. (Ch.) 271, 272.

Then his Lordship stated the principle of that case as set forth in the first paragraph of the head-note, but substituting the word "solicitor" for that of "agent," and went on to say, "What is the case here? Are there any allegations sufficient to make them liable as constructive trustees? No; I can find nothing. There are allegations which seem to point to the solicitors having got the trust funds into their hands, but only as solicitors to the trustees. Therefore the allegation is that the trustees themselves had realized the property and received the money; and there is nothing suggesting an improper receipt of the trust moneys by the solicitors. The £700 is stated to have been received by the trustees. Then the only other suggestion is that the trustees had taken credit for £455, which they had allowed the solicitors to deduct as the amount of their bill of costs; but we do not know that that was in any way an excessive sum. If it is, it is open to the *cestui que trust* to obtain taxation of the bill under the *Solicitors Act*. Therefore the joining of these solicitors defendants as constructive trustees cannot be justified." Then Lord Justice *Lindley* said, "*Primâ facie* the only persons to sue an agent are his principals; although, no doubt, it might be shewn that an agent was so involved in a breach of trust committed by his principal as to stand in the position of a *quasi* trustee, and in that case an action might be supported against him."

That seems to me to be a direct authority that solicitors cannot be made liable as constructive trustees unless they are brought within the doctrine of the Court with reference to other strangers, who are not themselves trustees, but are liable in certain cases to be made to account as if they were trustees. What is the general doctrine with reference to constructive trustees of that kind? It is that a stranger to the trust receiving money from the trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless there are facts brought home to him which shew that to his knowledge the money is being applied in a manner which is inconsistent with the trust; or (in other words) unless it be made out that he is party either to a fraud, or to a breach of trust on the part of the trustee. That appears to me to be in accordance with the decision to which I have referred,

STIRLING, J. and with the case of *Harries* v. *Rees* (1), before the Court of Appeal.

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The real difficulty in each case is to determine what is sufficient to fix the solicitors with the liability of constructive trustees. As I have said, they must have been parties to either a breach of trust, or a fraud, on the part of the trustee, or they must have brought home to them facts which shew that the fund was being applied in a manner inconsistent with the trust. In the present case the trustee and executor, as I have said, was entitled to resort in the first instance to the trust fund for payment of the necessary costs, charges, and expenses incurred by him in executing his trust. Doubtless he might commit acts which would deprive him of the right to resort to the fund. If, for example, he was an utterly impecunious man, and he sold out part of the trust estate for the purpose of applying the proceeds of sale in payment of a particular set of costs, and he did not so apply them, but kept them in his own pocket, I apprehend he would be debarred from further resorting to the trust estate for the purpose of paying the same costs. It would be a breach of trust on his part so to do; and if the solicitor, with knowledge of such facts, received payment out of the trust estate, I think it is very possible that he might be held, under those circumstances, to be a constructive trustee. But this is to be borne in mind, that in all these cases, for the benefit of *cestuis que trust* themselves, the power of the trustee to employ agents to assist him in the execution of the trust is not narrowly to be limited; and a mere suspicion or intimation that something is wrong in the administration of the trust will not, to my mind, be sufficient to deprive the solicitor of his right to accept payment out of the trust estate of costs, charges, and expenses properly incurred. Similar questions as to the position of bankers arose and were discussed by Sir *John Leach* in the case of *Keane* v. *Robarts* (2); and the doctrine which was laid down in that case was approved and followed by the House of Lords in the case of *Gray* v. *Johnston* (3). Sir *John Leach* says this: "Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor,

(1) 37 L. J. (Ch.) 102. (2) 4 Madd. 332, 357.
(3) Law Rep. 3 H. L. 1, 11.

is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust, by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be *primâ facie* consistent with the duty of an executor." So a solicitor dealing with a trustee, and having no notice of any breach of trust on his part, is, in my opinion, entitled to deal with him on the footing that he is executing the trust properly, and is doing nothing which is inconsistent with his duty. He is not bound before he accepts payment out of the trust estate to call upon the trustee to produce his accounts and satisfy himself that he has acted in all respects properly. But suppose that he does know of a breach of trust, can it be held that the mere knowledge of it is sufficient to preclude him from accepting payment? That would be a formidable doctrine, not merely as regards solicitors, but also as regards auctioneers and stockbrokers. Suppose a stockbroker had knowledge that part of a trust fund is improperly invested, and that the trustee might be called upon to make good any loss which was occasioned by the investment, would he be precluded from deducting his commission upon a proper sale of another part of the trust estate? I think it would be difficult to come to such a conclusion; and to my mind, in order that the solicitor may be debarred from accepting payment out of the trust estate, he must be fixed with notice that at the time when he accepted payment the trustee had been guilty of a breach of trust such as would preclude him altogether from resorting to the trust estate for payment of costs, so that in fact the application of the trust estate in payment of costs would be a breach of trust.

If that be the correct view of the law, what do I find in the present case? This, that the trustee and executor improperly attempted to acquire, and did acquire, part of the trust estate for his own use and benefit. As regards the conduct of his solicitors, with one exception I cannot see anything which would lead me to cast any blame upon them whatever. It appears to me that down to the time of the sale by auction, at which the trustee and

STIRLING, J. executor made a bid, through an agent apparently, and attempted to acquire part of the plant for his own use, they acted perfectly properly. They seem to me to have advised him that he could not do that, and that if he desired to acquire the property for his own benefit, the only possible mode of doing it was to apply to and obtain the sanction of the Court in a suit properly framed for the purpose; and the fact that the trustee had, contrary to their advice, acquired the property seems to have come upon them with the greatest surprise. The letters which passed between the solicitors and the auctioneers and trustee on and after the 19th of October, 1883, were, as far as I can see, perfectly *bonâ fide* letters upon the part of the solicitors. They then learned for the first time that the trustee was doing something that might be seriously found fault with by a Court of Equity or by the *cestui que trust.* At a subsequent period, there is a letter which is dated the 18th of March, 1885, and in it they dealt with a certain balance that was remaining in the hands of the trustee in respect of the purchase-money of part of the plant. In that letter the solicitors suggested how that was to be dealt with in the account which they were on the point of rendering on his behalf to the Court, namely, that the balance should be dealt with as a payment made to the auctioneers in the first instance, and afterwards paid back by the auctioneers, and received by the trustee from them. Why that suggestion was made, or what good it would do, I confess does not appear clear to me. But, notwithstanding that there was a suggestion that in the accounts part of the transaction should appear otherwise than it really was, I cannot come to the conclusion, on the evidence before me, that the solicitors were parties to any fraud, or that they intentionally joined in any breach of trust whatever. No doubt they had notice, at the time when they received the payments, some of which were certainly made to their knowledge out of the trust estate, that the trustee had committed a breach of trust; but I do not think that they had notice that the transaction was such as to preclude the trustee from resorting to the trust fund for payment of his costs, or that any such amount as was ultimately certified to be recoverable from the trustee could be charged against him. Even at the moment when they carried in the accounts in the action, in April, 1885,

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there appeared by the accounts they rendered to be a balance in favour of the trustee. I do not think that the facts are sufficient to justify me in holding that the solicitors were in this case affected with such notice of the position of the trustee with reference to the trust fund that I ought to hold them to be constructive trustees, and fix them with liability to repay the sums which they have received out of the trust estate on account of their costs. Upon these grounds I think that the application has failed, and having failed, I also think that the costs ought to follow the result and must be paid by the Applicants.

Solicitors: *Wm. Foster; Bower, Cotton & Bower.*

T. F. M.

C. A.
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Nov. 19.

In re SMITH.
Ex parte LONDON AND NORTH WESTERN RAILWAY COMPANY AND MIDLAND RAILWAY COMPANY.

Payment out of Court—Purchase-money of Settled Land taken by Railway Company—Trustees—"Party becoming absolutely entitled"—Lands Clauses Consolidation Act, 1845, *s.* 69 [*Revised Ed. Statutes, vol. ix., p.* 642]—*Settled Land Act*, 1882, *s.* 21, *sub-s.* 9.

Where purchase-moneys of settled lands taken by a railway company have been paid into Court under the *Lands Clauses Consolidation Act*, 1845, trustees for sale of such lands are not, either under the *Lands Clauses Act*, sect. 69, or the *Settled Land Act*, sect. 21, entitled as of right to payment out. Under the *Settled Land Act* the Court has a discretion to order such payment. Whether it has such discretion under the *Lands Clauses Act*, *quære*.

In re Hobson's Trusts (1) doubted.

A railway company took lands, held by the two trustees of a will, upon trust for the separate use of *A.*, a married woman, during her life, with remainder to her children, as she should appoint, and, in default, to such children as tenants in common in fee simple; and paid the purchase-moneys into Court. The two trustees of the will were afterwards appointed trustees under the settlement made by the will for the purposes of the *Settled Land Act*, 1882.

A. and the two trustees then petitioned that the fund in Court might be transferred to the two trustees to be held by them upon the trusts of the will.

At the date of the petition *A.* was sixty-five years old, and had three children who had all attained twenty-one, and these children were respondents to the petition and appeared to consent.

One of the two trustees was a solicitor, and the firm of which he was a member acted as solicitors to the trust, and as solicitors both for the Petitioners and Respondents.

Upon the hearing of the petition, *Kay*, J., considering that it was in the discretion of the Court whether or not to order payment out to the trustees, declined to make the order, upon the ground that the remaindermen were not represented by an independent solicitor.

Upon appeal, the Court held that the Petitioners were not entitled as of right to payment out or transfer of the fund, and declined to interfere with the discretion of the Court below.

PETITION for payment out of Court.

Samuel Smith, who died in 1830, by his will dated in 1829, gave all his real and leasehold estates to trustees, their heirs, and

(1) 7 Ch. D. 708.

assigns, upon trust, in the events which happened, for his three daughters; directing his trustees, when and as each of his three daughters attained twenty-one or married, to convey to each of them one-third part of his real and leasehold property, so and in such manner that each daughter should be entitled to the rents of one-third part thereof for her sole use, and with power for each daughter by will to give her third share to all or one or more of her children as she should think proper; and in default of gift by such will, her share was to go to her children equally as tenants in common in fee simple; and the testator directed that in such conveyances to be made to his daughters, all necessary trustees and trusts should be inserted, and he empowered his trustees to make partition of his real and leasehold property so intended for his daughters either before or after such conveyances; and the will contained a power of sale, which, however, was now exhausted, and a gift over in default of issue of any one or more of the testator's daughters. All the testator's three daughters survived him, and attained twenty-one, and *Avarilla Smith*, one of them, in 1850, married *Henry Columbus Hurry*, and had issue three children, all of whom had attained twenty-one.

In 1851 a partition deed was executed whereby it was declared, *inter alia*, that the trustees should stand possessed of certain hereditaments therein specified as the separate share of *Avarilla Hurry* under the trusts of the said will.

In the years 1877 and 1880 the *Midland Railway Company* took for the purposes of their undertaking certain portions of the hereditaments which were the separate share of *Avarilla Hurry*; and on each occasion paid the purchase-moneys into Court to the credit of *Ex parte* the company in the matter of their Act "in respect of land claimed by *Avarilla Hurry* as tenant for life."

In the year 1883 the *London and North Western Railway Company* contracted with *Avarilla Hurry*, with the consent of the trustees for the time being of the will of *Samuel Smith*, for the purchase of other portions of the hereditaments forming the separate share of *Avarilla Hurry*, and they paid the purchase-moneys into Court to the credit of *Ex parte* the company in the matter of their Act "in respect of lands belonging to *Avarilla*

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Hurry as equitable tenant for life without power of sale." All the lands so taken by these two companies were duly conveyed to them; and by an order of Court, dated the 13th of April, 1888, and made in the matters of the sums of New £3 per cents., and Consolidated £3 per cent. Annuities, on which the purchase-moneys had been invested, and in the matter of the *Settled Land Act*, 1882, *Henry Addenbrooke* and *Thomas Rochford*, the trustees for the time being of the said will, were appointed trustees under the settlement made by such will for the purposes of the *Settled Land Act*, 1882. The fund thus paid into Court was now represented by the sums of £1192 12*s.* and £3986 0*s.* 10*d.* £2 15*s.* per cent. Consolidated Stock, and this petition was presented by *Avarilla Hurry* and the two trustees of the will, one of whom was a member of a firm of solicitors in a country town, who acted as solicitors to the trust and were the solicitors of the Petitioners in this matter, and the other was a saddler in the same town. At the date of the petition *Avarilla Hurry* was sixty-five years of age, and had for some years been living apart from her husband.

The petition prayed that the fund in Court might be transferred to the two trustees, to be held by them upon the trusts of the will affecting the same, and in the first instance it was served upon the two railway companies only. The petition came on for hearing before Mr. Justice *Kay*, on the 12th of May, 1888, and was directed by his Lordship to stand over in order that the Petitioners might procure the consent of the three children of *Avarilla Hurry*.

The Petitioners then procured consents from such children, and made them Respondents to the petition, and brought the petition on again on the 23rd of June, 1888.

On that occasion the three children appeared by separate counsel to consent to the prayer of the petition, but such counsel was instructed by the solicitors for the Petitioners, and *Kay*, J., considering that it was within the discretion of the Court whether or not to order payment out to the trustees, declined to make any order upon the petition, upon the ground that the remaindermen, the three children of *Avarilla Hurry*, were not represented by an independent solicitor.

The Petitioners now appealed.

E. P. Hewitt, for the Petitioners:—

Trustees for sale are parties becoming absolutely entitled within the meaning of sect. 69 of the *Lands Clauses Consolidation Act*, 1845, and are entitled as of right to payment out: *In re Hobson's Trusts* (1). In this case the trustees, together with the tenant for life, could sell.

[BOWEN, L.J.:—Was that case argued on both sides?]

Apparently not.

[BOWEN, L.J.:—Are we bound by it?]

[LINDLEY, L.J.:—I think that case was a decision that the Court had the power to make the order. You want to go a step further, and maintain that the Court must make the order.]

The case is a decision that trustees for sale are within the expression persons "absolutely entitled."

[BOWEN, L.J.:—Is there any other case in which the Court has held that trustees for sale are persons absolutely entitled?]

In *In re Evans' Settlement* (2) a fund in Court, consisting of purchase-moneys paid into Court by a railway company, was, upon the petition of a tenant for life who had children, some of whom were infants, ordered by *Jessel*, M.R., to be paid out to the trustees of the settlement, they undertaking to hold it on the trusts of the settlement. And in *In re Wright's Trusts* (3) a similar order was made by *North*, J., for payment out to trustees for the purposes of the *Settled Land Act*, to be held by them upon the trusts of the will. So, in this case, the trustees are also entitled to payment out under the *Settled Land Act*, 1882, sect. 21, sub-sect. 9, which, taken in conjunction with sect. 32, provides that money paid into Court under the *Lands Clauses Consolidation Act*, 1845, may be applied "in payment to any person becoming absolutely entitled, or empowered to give an absolute discharge." Moreover, in this case, the gift over contained in the will has ceased to be applicable; and *Avarilla Hurry*, being past child-bearing, she and her three children are, in fact, absolutely entitled to the fund.

(1) 7 Ch. D. 708. (2) 14 Ch. D. 511.
(3) 24 Ch. D. 662.

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[LINDLEY, L.J.:—It comes to this. The clients of a solicitor ask for money to be paid to two trustees, of whom he is one, to be held by them upon the trusts of a will.]

If the Court feels any difficulty in making the order as prayed, then I ask that the petition may stand over in order that another solicitor may be instructed on behalf of the children, or that new trustees may be appointed.

J. W. Leslie, for the children, supported the petition.

T. W. Ratcliff, for the *London and North Western Railway Company.*

COTTON, L.J.:—

This is an appeal from a refusal of Mr. Justice *Kay* to make an order for payment out to the two trustees of a settlement of a sum of money paid in by certain railway companies under the *Lands Clauses Consolidation Act,* 1845, as the purchase-moneys of settled lands taken by them. The application is for the payment to the two trustees, to be held by them upon the trusts of the settlement. The appeal to this Court is upon the ground that the Court below has refused to grant to the Applicants that which is their right; and the question we have to consider is whether they are entitled as of right to this payment out? In the first place it was said that their right depended upon the *Lands Clauses Consolidation Act,* 1845, and sect. 69 was referred to as the section on which their right was based. [His Lordship then read that section, and continued:—] Now under that section the money is to be paid into the bank, and to remain so deposited "until the same be applied" to one or more of several alternative purposes which are enumerated, and the last of which is "or in payment to any party becoming absolutely entitled to such money." And that is the alternative on which the Petitioners rely as giving them the right they claim. Now there is nothing in that section giving to any person any right, unless the Court thinks fit, to have the money applied in any of the ways mentioned. There is no direction that the money must be

so applied. It is said, however, that this Court always pays out money to any person who is of right entitled to it, unless there is some reason to the contrary. It is also said that it has been decided by the Court of Appeal that trustees with a power of sale come within sect. 69 as persons "becoming absolutely entitled," and the case of *In re Hobson's Trusts* (1) was referred to as an authority in that behalf.

Now, with the greatest respect to Lord Justice *James*, by whom the judgment in that case was delivered, I do not look upon that case as a decision by him that trustees in such a position are entitled as of right to require money to be paid out to them. The case came from the Palatine Court, not exactly by way of appeal, but it was mentioned to the Court of Appeal at the suggestion of the Vice-Chancellor in order to elicit the opinion of that Court whether he could properly make the order asked for, which he himself felt a difficulty in doing. The money arose from the sale to the corporation of *Manchester* of certain shares of lands settled upon trust and with power to the trustees to sell and give receipts for the purchase-money, and the petition asked for payment out of the purchase-moneys of such shares to the trustees. The corporation who had paid the money into Court appeared and made no objection to the money being paid out to the trustees, and Lord Justice *James* seems to have thought that as the corporation made no objection the money might be reasonably paid out to the trustees, and that this would be a proper application of the money.

With the greatest respect to Lord Justice *James*, I feel great doubt whether he was right in coming even to that conclusion. I think that the words of sect. 69 point to a person who has become absolutely beneficially entitled to the money.

In my opinion, when money is paid in under the *Lands Clauses Consolidation Act*, trustees for sale cannot avail themselves of this section and say that it is their money, and that they are parties who have become absolutely entitled to it; although, no doubt, they are persons who can give a good receipt for it. That case has been much relied on; but, at any rate, sect. 69 does not give trustees having powers of sale any new right, but only assumes

(1) 7 Ch. D. 708.

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the existence of persons who have a right to payment out independently of the statute.

However, the difficulty as to the jurisdiction to order payment out to trustees has been now removed by the *Settled Land Act*, 1882. [His Lordship here read sects. 32 and 21 of that Act, and continued:—] Now under sect. 32 purchase-moneys of settled lands paid in under any Act of Parliament "may be applied as capital money arising under this Act," and under sect. 21 capital money arising under the Act shall when received be invested or otherwise applied wholly in one, or partly in one and partly in another or others of several modes, one of which is "in payment to any person becoming absolutely entitled or empowered to give an absolute discharge." But that does not give to trustees with power to give an absolute discharge the right to demand payment; it only gives the Court the power to order it. And if, as we are informed, orders have been made under sect. 21 of this Act similar to that which was made in *In re Hobson's Trusts* (1), that is quite right, because the trustees, although they are not persons "absolutely entitled," are persons "empowered to give an absolute discharge" in whose favour the Court has the power of making an order. That power of the Court is, however, discretionary, and the Judge below having exercised his discretion we ought not, in my opinion, to interfere with it.

In this case the family solicitor, against whom I say nothing, is acting for both Petitioners and Respondents, and is also one of the trustees asking for payment out, and Mr. Justice *Kay* may have thought, without in any way casting any reflection upon the solicitor, that it was undesirable that the remaindermen should be represented by the same solicitor as the Petitioners, and I myself am not satisfied under the circumstances to hand out the fund in Court, which is considerable, without knowing what is going to be done with it.

We were asked to allow the petition to be amended, and to direct it to stand over in order that the remaindermen might be represented by another solicitor. But I see no advantage in this, and I think we ought not to allow it. Because if a new case is to be made there is nothing to prevent its being made by another

(1) 7 Ch. D. 708.

petition. There will, therefore, be no order on the present petition.

LINDLEY, L.J.:—

I am of the same opinion. The question whether there was jurisdiction on the part of the Court to order this money to be paid to the trustees would have been open to some doubt had it not been for the *Settled Land Act*, 1882. The doubt is a very old one, and the decisions on the question have fluctuated. Lord *Romilly* thought that the money might be paid out: on the other hand, Vice-Chancellor *Stuart* and Vice-Chancellor *Malins* were of a different opinion. I am not prepared to say that we might not have had jurisdiction under the *Lands Clauses Consolidation Act*, 1845. But all difficulty of that kind has been put an end to, because under the altered language of the *Settled Land Act*, 1882, sect. 21, there can no longer be any doubt as to the jurisdiction and power of the Court to order the purchase-moneys of settled lands to be paid out to trustees empowered to give an absolute discharge.

But it is one thing to say that the Court has jurisdiction, and another thing to say that the Court is bound to exercise that jurisdiction in a particular case. The money is perfectly safe where it is, and what the parties want is to get it out of Court and pay it over to the trustees. Mr. Justice *Kay* had some misgivings; he thought there was something behind of which the parties did not wish to inform the Court, and in the exercise of his discretion declined to make the order. Are we bound to reverse that decision? Under the *Settled Land Act* the matter is within the discretion of the Court, and I think we are not bound to order this money to be paid out of Court, and to reverse the order made by the Judge below in the exercise of his discretion.

BOWEN, L.J.:—

I am of the same opinion. The first point urged upon us was that the Appellants were entitled as of right to payment out to the trustees under sect. 69 of the *Lands Clauses Consolidation Act*, 1845. The answer is that sect. 69 does not give any such right,

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In re SMITH. *Ex parte* LONDON AND NORTH WESTERN RAILWAY CO. AND MIDLAND RAILWAY CO.

Bowen, L.J.

but rather assumes a certain class of persons to have rights in existence already. Can it be said that trustees for sale are within the language of the section persons "becoming absolutely entitled to such money"? It is said that *In re Hobson's Trusts* (1) decided that they are. I do not profess to speak with the knowledge of my brethren on a question of equity, but speaking as a common lawyer, though one having some experience in construing statutes, I fail to understand how trustees can be said to have "become absolutely entitled."

But the question is set at rest by the later enactment in the *Settled Land Act*, 1882, which gives the Court jurisdiction to order payment out to "any person becoming absolutely entitled or empowered to give an absolute discharge," and there is no longer any doubt as to the power to make the order. But the power conferred by that Act is discretionary, the Court is always slow to interfere with the discretion of the Court of first instance, and I see no reason to interfere with the exercise of that discretion in the present case.

Ratcliff, for the *London and North Western Railway Company*, asked for their costs of the petition, and

THE COURT directed such costs to be paid by the Petitioners.

Solicitors: *Iliffe, Henley, & Sweet, for Holbeche & Addenbrooke, Sutton Coldfield; C. H. Mason.*

(1) 7 Ch. D. 708.

W. W. K.

FARRAR *v.* FARRARS, LIMITED.

[1886 F. 1088.]

C. A.
1888
CHITTY, J.
March 1, 6, 7, 8, 13, 14, 27.
C. A.
Nov. 20, 22, 23;
Dec. 21.

Vendor and Purchaser—Power of Sale—Company—Sale by Mortgagee to Company in which he is a Shareholder.

Three mortgagees in possession, of whom *F.* was one, and acted as their solicitor in the transaction, sold under the powers of sale in their mortgage deed to a company formed for the purpose of purchasing the property. The company was to some extent promoted by *F.*, who became the solicitor to the company and had a substantial interest as a shareholder :—

Held (affirming the decision of *Chitty*, J.), that the sale could not be set aside on the simple ground that *F.* was a shareholder in the company, for that a sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to himself along with other people.

But, *held*, that there was such a conflict of interest and duty in *F.*, of which the company had notice, as to throw upon them the burden of upholding the sale:

Held, that the company had discharged themselves of this burden by shewing that *F.* had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale.

M. E. FARRAR, *W. T. Dewhurst*, and *John Riley Farrar* were mortgagees under a deed of the 9th of November, 1878, for £12,355, of certain property including (along with other property) some freehold lands at *Brighouse*, and a right to get stone for a term of years in certain adjoining lands. The mortgagors (*James Farrar* and others) were stone merchants, and held the property for the purposes of their business. On the 29th of May, 1880, the mortgagors mortgaged another property at *Brighouse* to the same mortgagees for £1000. On the 11th of September, 1885, the mortgagees took possession of both properties. At this time the stone had only been worked to a small extent, and the power of sale under the first mortgage deed had arisen. On the 6th of October, 1885, the mortgagees gave the six months' notice required to enable them to sell under the later deed, and in the same month they issued preliminary advertisements in the newspapers for the sale of the *Brighouse* property.

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Previous to this *J. R. Farrar*, who was a solicitor, and acted as solicitor of the mortgagees, had endeavoured to induce the mortgagors to pay off the mortgage, and also had tried to find someone who would take a transfer of it. A quarry, forming part of the mortgaged property, was put up for auction, but there was no bid, and a competent person advised the mortgagees that there was no prospect of being able to sell by auction.

In the early part of October, 1885, *J. R. Farrar* suggested to Mr. *Taylor*, an accountant, the formation of a company to acquire and work the stone quarries. Mr. *Taylor* entertained the proposal, and he, with Mr. *Cockcroft* and Mr. *Riley*, negotiated with the mortgagees as to the price to be paid by the intended company for the property. *J. R. Farrar*, for the mortgagees, endeavoured to obtain £7700, but *Taylor* would not agree to this. On the 10th of November, 1885, *Taylor* made a written offer of £7500. *J. R. Farrar* did not accept the offer, but communicated it to the mortgagors, saying that he should accept it if the mortgages were not paid off by a certain day. The mortgagors asked for a detailed account of what was due, but did not suggest that £7500 was an undervalue. Negotiations went on between *J. R. Farrar* on the one part, and *Cockcroft*, *Riley*, and *Taylor* on the other, which ended about the beginning of December, 1885, by an undertaking on the part of the mortgagees to sell to a company for £7700 if a company could be formed.

A limited company was accordingly formed with a nominal capital of £20,000 in £10 shares, and was registered on the 2nd of March, 1886. *J. R. Farrar* acted as the solicitor of the company, and his name appeared as such in the prospectus. He was a subscriber to the memorandum of association for fifty shares. On the 9th of March, 1886, a contract was entered into between the mortgagees and the company to sell the property to the company for £8100, being the £7700 agreed upon along with a sum of £400 which the mortgagees had been obliged to pay to the landlords of the quarries. It was part of the terms that a certain part of the purchase-money should remain on mortgage of the property. On the 13th of March *Dewhurst*, another of the mortgagees, took twenty shares in the company. The conveyance to the company was afterwards executed, and the company

mortgaged it to the former mortgagees for the portion of the purchase-money which remained unpaid.

On the 5th of July, 1886, the mortgagors (*James Farrar* and others) commenced this action to have the sale set aside on the grounds that the company was promoted by *J. R. Farrar* for the purpose of purchasing the property from the mortgagees at an undervalue, that the sale was collusive and fraudulent and made at a gross undervalue, and that *J. R. Farrar*, who was one of the mortgagees, was interested in the company. A point was also raised as to whether the power of sale had arisen, which does not appear to call for a report.

The action came on for trial before Mr. Justice *Chitty* on the 1st of March, 1888.

Romer, Q.C., and *Ingle Joyce*, for the Plaintiffs.

Rigby, Q.C., *Lockwood*, Q.C., and *Farwell*, for the Defendants.

1888. Mar. 27. CHITTY, J.:—

The question is, whether the sale ought to be set aside? The formal contract of sale was dated the 9th of March, 1886. The sale was made by mortgagees under powers of sale to an incorporated company, "*Farrars, Limited*," formed for the purpose of buying. The price was £8100, to which should be added a sum of £1000 which remained to be paid to the lessors under the leases. The property sold was of a speculative nature. It consisted of stone quarries and a tipping-ground, the principal value of which was its use in connection with the quarries as a place for depositing the spoil. The tipping-ground had also some questionable prospective value as available for building at some more or less distant period, and carried with it obligations of a more or less onerous character. The sale is impeached by the Plaintiffs, the mortgagors, on two grounds, namely, first, that it was a fraudulent sale at an undervalue to a company promoted by the Defendant, *John Riley Farrar*, a solicitor, one of the mortgagees and vendors; and secondly, that the Defendant *John Riley Farrar* was personally interested in the purchase, being at the time of the sale the holder of shares in the company, representing one-tenth of

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the company's subscribed capital. The second ground is raised as a distinct point of law, but it is also relied on as part of the case shewing an unfair sale. The first question then is, was the sale a dishonest transaction? A mortgagee exercising a power of sale is not a trustee of the power. The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt. In most cases (as in that before me) he is required by the terms of the power to give notice to the mortgagor, and to allow a certain time to elapse before he can duly proceed to a sale. In the present case a six months' notice was required. This term of the contract gives to the mortgagor what the parties consider to be a reasonable time to do his best to stop a sale by the mortgagee, which he may do by redeeming or by finding a transferee or a purchaser of his own. The mortgagor has no right after the power has arisen to insist that the mortgagee shall wait for better times before selling. This observation applies in full force where the mortgaged property is of a speculative character, and is not producing any income. The mortgagee has a right to obtain payment of his debt through the exercise of his power when it has arisen, without regard to the then existing condition of the market. He cannot be required to run any risk in postponing the sale, or to speculate for the mortgagor's benefit. The property comprised in the sale may be shortly described as the *Brighouse Quarries*. Other property was included in the securities, namely, a property at *Liverpool*, two policies of insurance on lives, and a stone quarry called *Birks Royd*. The *Brighouse Quarries* were held under various leases or grants made in the years 1876 and 1877. Part was leasehold and part freehold, but the distinction is not of any great importance in the present case, a lease of minerals being in fact a sale. Under the leases thirty-five years were allowed to get the stone. The terms of the leases as to payment for the stone were of the usual kind in such cases. The substance of them was that the purchase-money for the stone was made payable by instalments within a term of ten years or thereabouts, so that if the stipulations were observed the whole of the purchase-

money would be paid by the end of that term. The leases and grants were made at a time when the market price of stone in these quarries stood exceptionally high. From that time it gradually fell till the end of 1885, and at the beginning of 1886 there were symptoms of a rise. The mortgagors themselves worked the quarries as a losing concern. In September, 1885, there were arrears of a considerable amount, both in relation to payments to be made to the lessors and to the mortgagees. By reason of the default the mortgagees had, in June, 1885, to pay to *Macaulay's* trustees, the lessors of part of the property, a sum of upwards of £1200 for arrears of instalments and interest which had become due in January and July, 1884, and January, 1885. They made this payment to save an apprehended forfeiture. The mortgagors had been called upon to pay, but were unable to find the money. The mortgagees' original security was taken in 1878, and provided for payment of the mortgage debt, which was over £12,000, by instalments. Default having been made in payment of instalments to the amount of £1000, a further security was taken in 1880, and the £1000 thus secured was overdue under the covenant in September, 1885. In September or the beginning of October, 1885, the mortgagees had to pay the premiums on the life policies in order to save them from dropping. The mortgagors had given a bill of exchange for the amount of an instalment due to Mr. *Renshaw*, one of the grantors. The bill was dishonoured. The property comprised in that grant was subject to a lien for unpaid purchase-money. The mortgagees themselves were trustees of the securities for the persons interested in the estate of *Samuel Farrar*, deceased, a brother and former partner of the Plaintiff *James Farrar*. It appears from the indemnity given to the Defendant *Dewhurst*, one of the trustees, in 1885, on occasion of his accepting the trust, that the Defendant *John Riley Farrar* was beneficially interested in the mortgage debt. The indemnity was required by the Defendant *Dewhurst* because, as appears by the recitals in the deed, it was considered by the parties to the deed that, owing to the depressed state of trade, the property comprised in the mortgage of 1878 had become much depreciated in value, and would, if then put up for sale, probably not realize the

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amount of the mortgage debt. Having, then, the beneficiaries in the trust estate at their backs, the two mortgagees ran a risk of liability if they shewed want of due diligence in realizing the securities, which were considered of doubtful sufficiency. The mortgagees had been endeavouring since September, 1884, to obtain payment from the mortgagors, and in July or August, 1885, they tried to obtain the money from other quarters, but in vain. They applied to the Defendants, Messrs. *Wavell*, the second mortgagees, and to the solicitors for the Plaintiffs in this action, and also to the Defendants, the *Halifax and Huddersfield Union Banking Company*, to pay off or take a transfer of their securities, but without success. In these circumstances the mortgagees took possession of the *Brighouse Quarries* on the 11th of September, 1885, and of other parts of the property comprised in their securities. Various attempts were made about that time and subsequently, both by the mortgagees and the mortgagors, to procure some person to take a transfer or to purchase, but all these attempts failed. The Plaintiff *James Farrar*, as late as January, 1886, was proposing to get up a company to buy. The mortgagees thus stood in the difficult and unenviable position of mortgagees in possession of a hazardous property, producing no income, and from which nothing could be made unless the quarries were worked. The mortgagees were justified, not merely in law, but as a matter of fair dealing, in taking possession. They had shewn considerable forbearance, and had given ample opportunity to the mortgagors to ward off that which was undoubtedly a calamity to them. The stoppage of the works brought about a crisis in the affairs of the mortgagors. They called their unsecured creditors together, and made a composition with them of 10*s.* in the pound. This arrangement was made at the beginning of October, 1885. In their statement of affairs they placed their liabilities to secured general creditors at £24,447, shewing a surplus of £1245 on the estimated value of the securities. This surplus, or estimated surplus, formed part of the £10,600 set down as the total assets available for the unsecured creditors, whose debts were placed at £3487. The circumstance that the creditors agreed to accept 10*s.* in the pound on their debts, taken in connection with the other parts of the statement

of affairs, has some bearing on the question whether the sale was at an undervalue. It shews what the creditors thought of the value of the Plaintiffs' equity of redemption. It is not necessary to state in detail the attempts made to find a transferee or purchaser.

I now proceed to state the leading facts which occurred after the mortgagees had taken possession. They are to be gathered from the correspondence and the testimony of witnesses who were examined in the course of the long trial. These facts are relied upon by the Plaintiffs as shewing a corrupt design on the part of the Defendant *John Riley Farrar* to obtain the property at an undervalue for a company in which he was to be, and in the event was, personally interested. The more important witnesses as to these facts are Mr. *Cockcroft*, chairman of the company, Mr. Alderman *Riley*, Mr. *Taylor*, the accountant, and the Defendant *John Riley Farrar*. These gentlemen gave their evidence in a satisfactory manner. The Defendant, *John Riley Farrar*, was cross-examined with some severity, but not with undue severity. The attempt to impeach his veracity failed. Speaking generally, I accept his evidence as truthful. In several matters of importance he was corroborated by the other witnesses I have named. Where his testimony was in conflict with the Plaintiff *James Farrar* in regard to the conversation between them as to the Plaintiff *James Farrar* becoming manager of the proposed company, I prefer his testimony as more worthy of reliance. The Plaintiff *James Farrar's* memory, as he has admitted, has become impaired by illness. The Defendant *John Riley Farrar* produced his diary in Court, and allowed the Plaintiffs' counsel and solicitors to examine it, and also his ledger out of Court during an adjournment in the course of his cross-examination. If during the course of the transactions in question he did anything wrong, he was unconscious that he was doing anything wrong. He concealed nothing; he placed his name openly on the prospectus and articles of association of the company. In October, 1885, the mortgagees issued their preliminary advertisements in relation to the sale of the *Brighouse Quarries* by auction or private treaty. By these advertisements they invited offers to treat, but received none. On the 4th of

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November the *Birks Royd Quarries* were put up for sale by auction. The sale had been well advertised, and was well attended. One of the Plaintiffs was present. There was no *bonâ fide* bid. The auctioneer suggested £800 as a bid, but no response was made. These quarries had been valued by Mr. *Horsfall* in 1883 at £4000; but some stone had been got out in the interval. *Birks Royd*, as I have said, was not included in the sale to the company; it still remains unsold. Subsequently one of the Plaintiffs negotiated for the purchase of *Birks Royd* for £1100 or £1200, but did not offer to pay, except by instalments, and made no satisfactory offer as to a substantial deposit. These facts are very material on the question of value, and the difficulty, or rather the impracticability, of selling by auction at this time. They corroborate strongly the testimony of Mr. *Hepper*, the auctioneer, and a witness for the Defendants, that in 1885 quarries were almost unsaleable, and the opinion which he expressed at the time that it was not practicable to sell the quarries by auction. Other witnesses deposed to the same effect. It was urged by the Plaintiffs' counsel that the mortgagees withdrew the *Brighouse Quarries* from the proposed sale by auction for the sinister purpose of selling privately to the proposed company. The mortgagees were fully justified in not attempting to sell by auction, and they had no such sinister purpose. One of their reasons for not proceeding to a sale by auction in 1885 was that the six months' notice required by the power of sale had not expired as to a portion of the property, and that the mortgagors declined to waive the notice. Having failed to obtain a purchaser in any other way, the idea to form a company to buy and work the quarries presented itself to the Defendant *John Riley Farrar*, and he communicated the idea to Mr. *Taylor*, the accountant. This took place in October, 1885. Mr. *Taylor* submitted the proposal to Mr. *Cockcroft* and Mr. *Riley*, and these three gentlemen, in company with the Defendant *John Riley Farrar*, visited and inspected these quarries. The Defendant *John Riley Farrar* had previously supplied Mr. *Taylor* with particulars, in which he had placed the value of the *Brighouse Quarries* at £10,800. After the quarries had been inspected, he asked £10,000 and £8000 for them, but Mr. *Cockcroft* and

Mr. *Riley*, who were acting in their own interests, as persons intending to take shares in the proposed company, declined to listen to such sums. Ultimately they offered, through Mr. *Taylor*, £7500, conditionally on the company being formed. This offer was made on the 10th of November, and on the 13th of November it was communicated by letter of that date to the Plaintiffs' solicitors, who were also second mortgagees, and to the bank, the third mortgagees, and it was immediately communicated to the Plaintiffs by their solicitors. The only reply to the letter was a request by the Plaintiffs' solicitors to be furnished with the accounts. From first to last, notwithstanding that a considerable correspondence was passing, no objection was made to the £7500; there was no warning, no remonstrance of any kind. The letter did not mention that the offer was conditional on the formation of the company, but stated that if the persons to whom it was addressed did not elect to pay off the mortgagees by the Tuesday following, the Defendant *John Riley Farrar* (who was acting for the mortgagees) would conclude the contract. [His Lordship, after dealing with the facts and evidence on this part of the case, proceeded:—]

I find as a fact that there was an honest and independent bargain between the Defendant *John Riley Farrar*, acting for the mortgagees on the one hand, and Mr. *Riley* and Mr. *Cockcroft*, acting for the intended company on the other hand, and that this bargaining resulted in the price being fixed at £7700, conditionally on a company being formed, and at this time the Defendant *John Riley Farrar* had no thought of joining the intended company or taking shares in it. At the meeting of the 21st of November it was arranged that the Defendant *John Riley Farrar*, and Mr. *Taylor* should get up a list of gentlemen likely to form the company, and should endeavour to obtain shareholders. This, the Defendant *John Riley Farrar* did: he sent circulars and made a journey to *London* for the purpose, but he failed in his endeavours and did not obtain a single shareholder. In the course of his endeavours he applied to the Plaintiff *James Farrar*. The shareholders were found with some difficulty by Mr. *Taylor*, Mr. *Riley*, Mr. *Cockcroft*, or their friends; Mr. *Cockcroft* put himself down, in 1886, for 100 shares, but being appre-

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hensive of the speculation he subsequently declined to venture so much and eventually agreed to take fifty shares only. In pursuance of the instructions given him on the 12th of January, 1886, the Defendant *John Riley Farrar* prepared the memorandum and articles of association and the prospectus of the intended company. In this way he acted as solicitor for the promoters and the intended company. For these services and his endeavour to obtain shareholders he received the moderate remuneration of 25 guineas after the company had been registered. He was appointed solicitor by the directors. It was not until after the 12th of January that he agreed to take shares. This he did some time about January or the beginning of February. The company was registered in March, 1886, and the formal contract of sale was signed, as already stated, on the 9th of that month. The £7700 formed the basis of the contract price. After that sum had been fixed, and before the contract was signed, a sum of £400 fell due under one of the leases, and the mortgagees had to find the money. The £400 was accordingly added to the £7700, which made up the contract price of £8100. No circumstance had occurred in any way affecting the value of the property in the interval between the time when the £7700 was fixed and the signing of the contract. Upon the question of value, I find as a fact that the property was not sold at an undervalue, and that the price was the best that could reasonably be obtained in the circumstances. It is true that the mortgagees did not procure a professional valuation for the purpose of the sale, but they had taken one a few years previously, and the attempted sale of *Birks Royd Quarries*, was a striking commentary on such valuations. [His Lordship referred to and commented upon the evidence on this part of the case.]

I come now to the second question considered as a matter of law. A mortgagee cannot sell to himself, nor can two mortgagees sell to one of themselves, nor to one of themselves and another. The reasons for this are obvious, and are not merely formal but substantial. A man cannot contract with himself, and in the cases supposed there cannot be any independent bargaining as between opposite parties. For similar reasons a mortgagee cannot sell to a trustee for himself; he cannot

buy in the name of another. But when mortgagees sell to a corporation there are, *primâ facie*, two independent contracting parties and a valid contract, and if the bargaining is real and honest, and conducted independently by the mortgagees on the one hand, and by the directors or officers of the corporation on the other, and it is satisfactorily shewn that in concluding the terms of the sale the parties were in no way affected by the circumstance that one of the mortgagees had some interest as a shareholder in the corporation, I see no sufficient reason that the sale ought not to stand. By way of illustration, I put the case of an honest transaction of sale between the mortgagees and one of the great railway companies, such as the *London and North Western Railway Company*. It is urged that, as a matter of principle and on the ground on which a Court of Equity acts where there is a conflict between interest and duty, the sale to *Farrars, Limited*, must be avoided, simply because the Defendant *John Riley Farrar* held shares. But the proposition is contrary to the decision of *Bacon*, V.-C., in *Hickley* v. *Hickley* (1). In that case, on the facts, greater difficulties were presented than in the case before me. One of the selling trustees was interested beneficially under the settlement of which the purchasers were trustees; indeed, the property sold and bought was a house, which was purchased at his request as a residence for himself and his wife. The Vice-Chancellor held on the facts that the transaction was honest, and he decided on the law that he was not bound to upset the sale merely because one of the selling trustees was beneficially interested in the purchase. It appears to me, then, that this sale ought not necessarily to be set aside simply because the Defendant *John Riley Farrar* had an interest in the thing purchased as a member of the company which bought. Holding, as I do, that the material terms of the bargain were honestly and independently settled, and that the terms were not in any degree affected by the circumstance that the Defendant *John Riley Farrar* subsequently agreed to become a member of and to act as solicitor for the company, I am of opinion that the sale ought not to be set aside merely because he was a member and acting as solicitor for the company when the

(1) 2 Ch. D. 190.

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formal contract was signed. As to the argument that a decision in favour of the Defendants will open the door to fraud, the answer is, that every transaction of the nature disclosed by the facts of this case must be carefully inquired into and jealously watched, and that each case as it arises must be decided on its own merits. It is not quite clear at what date the terms of payment were finally settled as between the mortgagees and the company relating to the amount of the purchase-money to be left on mortgage. Those terms are not material as between the mortgagors and mortgagees. It is settled that a mortgagee may sell on the terms of leaving the whole or a considerable part of the purchase-money on mortgage: *Davey* v. *Durrant* (1). It is but lending by the mortgagees on a new security at their own risk. As between themselves and the mortgagors the mortgagees are chargeable with the whole of the purchase-money as money received at the date of the conveyance. In this case the mortgagees have never contested their liability to account to the mortgagors for the whole of the £8100 as money received at the time of the completion of the sale. It was suggested rather than argued for the Plaintiffs that, inasmuch as the six months' notice required by the terms of the power of sale had not, as to a part of the property, elapsed at the date of the contract of the 9th of March, 1886, the sale is invalid, at all events as to that part of the property; but there is nothing in this suggestion. The contract was not carried into execution until the conveyance was executed, and the six months had then expired and no circumstances had arisen in the meantime to affect the value of the quarries.

F. G. A. W.

C. A.

The Plaintiffs appealed. The appeal came on for hearing on the 20th of November, 1888.

Romer, Q.C., *Gainsford Bruce*, Q.C., and *Ingle Joyce*, for the Appellants:—

The facts are not now in dispute: and we do not allege actual fraud on the part of the Defendants, or that it has been proved that the property was sold at an undervalue; but we contend that

(1) 1 De G. & J. 535.

the relation between the parties and other special circumstances rendered the sale to the company invalid, and we desire to have it set aside. The vendor was a mortgagee, and as such was in a fiduciary relation to the mortgagors: it was his duty to take reasonable pains to get the best price, and he was incapacitated from selling to himself or to a company in which he had an interest. It may be that on the 21st of November, 1885, £7700 was the best price that *J. R. Farrar* could get for the quarries, but there was no contract binding him at that time, nor could there have been any, because the power of sale was not then exercise-able: and before the 10th of March, 1886, when the conveyance was executed, the stone market had risen, and if *Farrar* had taken pains he might have obtained a higher price. But we principally rely on the fact that *Farrar* was interested in the company to which he sold the property. He was an active promoter of it, and when it was formed took shares in it. It is not simply the case of one member of a corporation selling to the corporation, which in itself would be questionable; but *Farrar* was in effect selling to a partnership of which he intended to be a member, and in which he had a substantial interest. Moreover, when the company was formed *Farrar* became its solicitor and acted for both parties. Such a transaction is against public policy and ought to be set aside by a Court of Equity: *Downes* v. *Grazebrook* (1); *Orme* v. *Wright* (2); *Robertson* v. *Norris* (3); *Parnell* v. *Tyler* (4); *Martinson* v. *Clowes* (5); *Ex parte Burnell* (6); *Ex parte Badcock* (7); *Turner* v. *Trelawny* (8); *Guest* v. *Smythe* (9).

Rigby, Q.C., and *Farwell*, for the Defendants:—

We admit that a mortgagee cannot sell to himself, but the question here is, Was *Farrar* the purchaser or one of the purchasers in the sale of the property? We say he was not. He was not a promoter of the company, though he was favourable to its being formed, and he afterwards took shares in it. But when the bargain was made, on the 21st of November, 1885, he

(1) 3 Mer. 200.
(2) 3 Jur. 19.
(3) 1 Giff. 421; S. C., on appeal, 4 Jur. (N.S.) 443.
(4) 2 L. J. (N.S.) (Ch.) 195.
(5) 21 Ch. D. 857.
(6) 7 Jur. 116.
(7) Mont. & Mac. 231.
(8) 12 Sim. 49.
(9) Law Rep. 5 Ch. 551, 556.

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had no interest in the intended company, and it is admitted that at that time the price was a fair one. He had done all he could to get a higher price without success. This sale cannot be impeached on the ground that the fiduciary vendor was selling to himself and another. In such a case as that there is no contract either at law or in equity—there is no real bargain. It is said that this cannot be so, for admittedly the purchasing trustee can be held to his bargain, and it is contended that that is ratification, and that there cannot be ratification of a void contract. But in truth the holding a trustee to his bargain does not proceed on ratification but on estoppel. Having represented to his *cestuis que trust* that he had sold he shall not be allowed as against them to say that there was no bargain. But when you have two parties to a bargain, as when a trustee sells to a company of which he is a member, there are two parties who can contract and the only question is *bona fides*.

[COTTON, L.J.:—How far do you carry that? Suppose mortgagees with a power of sale sold to a company of which they were the only directors, could that be sustained?]

We say yes, if they could prove that the sale was made *bonâ fide* after taking all reasonable precautions to obtain a good price. Such a conflict of interests would make the case very suspicious, and would throw on the company a heavy burden of proof to shew that the sale was fair; but we say that a sale of that kind if made by trustees would not be voidable at the option of the *cestuis que trust*: *Erlanger* v. *New Sombrero Phosphate Company* (1); and a mortgagee is in a better position than a trustee: *Cholmondeley* v. *Clinton* (2).

Romer, in reply:—

The policy of the law is to prevent the question of *bona fides* being tried in cases where the same person is vendor and purchaser. The principle is not that a man shall not sell to himself, but that the sale shall be voidable if he both is seller and has a substantial interest in the purchase-money: *Ex parte Moore* (3).

(1) 3 App. Cas. 1218. (2) 2 Jac. & W. 1, 182.
(3) 51 L. J. (Ch.) 72.

1888. Dec. 21. The judgment of the Court (*Cotton*, *Lindley*, and *Bowen*, L.JJ.) was now delivered by

LINDLEY, L.J.:—

This action is brought by mortgagors to set aside a sale by their mortgagees. One ground relied upon was that the power was exercised prematurely, *i.e.*, before the right to exercise it had arisen. This point presents no difficulty, as more than three months' interest was in arrear.

The other ground relied upon was of a much more serious character. It was alleged by the Plaintiffs in their statement of claim that the sale was fraudulent and collusive and at an undervalue. Mr. Justice *Chitty* decided that this allegation was not proved, and he gave judgment for the Defendants. The Plaintiffs on appeal did not question the view of the Judge that there was no fraudulent sale at an undervalue, but they contended that fraud or no fraud, undervalue or no undervalue, the sale could not stand, inasmuch as it was in substance a sale by a mortgagee to himself and others under the guise of a sale to a limited company.

If this proposition were true the sale could not stand as against the mortgagor. It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself: *Downes* v. *Grazebrook* (1); *Robertson* v. *Norris* (2); nor to any one employed by him to conduct the sale: *Whitcomb* v. *Minchin* (3); *Martinson* v. *Clowes* (4). A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction.

A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which

(1) 3 Mer. 200.
(2) 1 Giff. 421.
(3) 5 Madd. 91.
(4) 21 Ch. D. 857.

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lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by an ordinary power of sale, and in our opinion, such a sale is warranted by such a power, and does not fall within the rule to which we have at present referred. But although this is true, it is obvious that a sale by a person to an incorporated company of which he is a member may be invalid upon various grounds, although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an undervalue or it may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction, and the company may be unable to prove it. Fraud in the present case is not now alleged; it was alleged in the Court below, and was then clearly disproved. But, for reasons which will appear presently, the circumstances attending the sale were such as, in our opinion, throw upon the company the burden of sustaining the transaction. The circumstances alluded to are shortly as follows:—

Mr. *John Riley Farrar* was a solicitor, he was one of three mortgagees with a power of sale, he acted for his mortgagees. He sold to a company, more or less promoted by himself, in which he had a substantial interest as a shareholder, and whose solicitor he was. Such a transaction has a suspicious appearance, and at the time of the sale there was apparently such a conflict of interest and duty on the part of Mr. *Farrar*, and such notice to the company of that conflict, as to throw upon the company the burden of upholding the sale. But the sale cannot be set aside on the simple ground that Mr. *Farrar* was a trustee for sale, and was a promoter of and shareholder in the company which purchased from him. It is necessary to see what his duties to his mortgagors were, and what he really did.

A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has

rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed: *Cholmondeley* v. *Clinton* (1); *Warner* v. *Jacob* (2).

Such being Mr. *J. R. Farrar's* position and duty as a mortgagee, let us see how he performed it. He and his co-mortgagees were themselves trustees, and he was forced to enter into possession and to work the quarries. He did his best to induce his mortgagors and subsequent incumbrancers to pay him off, failing in this, he advertised the mortgaged property for sale, and part of it, the *Birks Royd Quarry*, was put up to auction, and there was no bid; he was advised by a very competent person (Mr. *Hepper*) that it was useless to persevere in attempting to sell by auction, and no further attempts to sell in that way were made. This was in October 1885. It then occurred to Mr. *Farrar* that Mr. *Taylor* might be able to form a company to buy the *Brighouse Quarries*. *Taylor* saw *Cockcroft* and *Riley* on the subject, and they went with *Farrar* to see the quarries. On the 5th of November, Mr. *Farrar* told them that he would not take less than £7700 for the quarries, but they did not then agree to buy at that price. After this, viz., on the 10th of November, 1885, a written offer to buy the *Brighouse Quarries* for £7500 was made by *Taylor* to *Farrar*, and *Farrar* communicated this offer both to the mortgagors and to the second mortgagee, and he stated that he should accept the offer unless he was paid off before the following Thursday. The mortgagors' solicitors asked for a detailed account of the amount then due to the mortgagees. Mr. *Farrar* replied that he could not give a detailed account, but that he should say that, without reckoning the costs, it would be between £9800 and £9900. The mortgagors' solicitors again pressed for a detailed account, and it was promised as soon

(1) 2 Jac. & W. 1, 182. (2) 20 Ch. D. 220.

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as it could be made out. The account was not in fact sent until May, 1886. The mortgagors never offered to redeem, and never suggested that £7500 was too low a price. Moreover, the learned Judge has found, as a fact, that the mortgagors knew the state of the accounts, and that if they could have found the money, they would have had no difficulty in making a tender. They were not in truth misled or put off by not getting the accounts.

The offer of £7500 was never accepted, but on the 21st of November, 1885, there was a meeting between Mr. *J. R. Farrar* and Messrs. *Cockcroft*, *Riley*, and *Taylor*, and at this meeting a bargain was made between Mr. *Farrar*, on behalf of the mortgagees, and between Messrs. *Cockcroft*, *Riley*, and *Taylor*, as purchasers, that the price should be £7700, and that Mr. *Farrar* should assist them in forming a company to buy at that price. There is some difficulty in fixing the exact day when the £7700 was finally agreed to, it was certainly agreed to before the 7th of December, 1885, and Mr. *Taylor's* letter or circular of that date states what the bargain was. In effect it was this, that the mortgagors would sell to a company for £7700, part of which was to remain on mortgage if a company could be formed, and would buy at that price. No one was bound to buy, but the mortgagees agreed to sell if a purchaser could be found, and *Taylor* and his friends agreed to try and form a company to buy the property and Mr. *Farrar* agreed to assist them in doing so. There was, however, no agreement or understanding that Mr. *Farrar* should take shares in the company, or have any interest whatever in the purchase. At this time the six months' notice which the mortgagees had to give and had given of their intention to sell had not expired, but it was understood between *Farrar* and *Taylor* that no sale would be made until the power could be properly exercised.

We pause here to consider whether in thus acting Mr. *Farrar* was guilty of any breach of duty to his mortgagors. We cannot see any impropriety in his conduct, unless it be that he ought not to have agreed in November to sell at a future time for £7700. This, however, does not without more invalidate the sale: see *Major* v. *Ward* (1). If when the time came for

(1) 5 Hare, 598.

completion that price had become inadequate, he might perhaps have been chargeable with wilful default, and perhaps, having regard to his peculiar position at the time of sale, the sale itself might have been set aside. But there was no undervalue either when the agreement was made or when it was carried out. The learned Judge distinctly found this as a fact, he has stated that in his opinion the witnesses for the Defendants on the question of value are to be preferred to those on the other side. We cannot differ from him on such a point as this, and, taking this opinion as a guide, the evidence as to value justifies the conclusion at which he arrived.

Having arrived at this conclusion on the question of value, it appears to us that Mr. *Farrar* in no way disregarded his duty to his mortgagors, on the contrary, he was doing the utmost in his power to find a purchaser at the best price that could be got. At this time his interest was to get the best price he could, for his security was by no means ample, he was pursuing that interest, and was discharging his duty at the same time, and he had no conflicting interest in the matter.

This, in our judgment, settles the question. The subsequent agreements and conveyances do no more than give effect to the bargain which was entered into in November, and the real character of which has been already considered.

The agreement above mentioned having been made, the buyers and Mr. *Farrar* set to work to form a company to take the property. The mortgagors knew that attempts were being made to form a company to buy the quarries, but it does not appear that they knew that Mr. *Farrar* was assisting in its formation. This fact is, however, not material, for the validity of the sale does not depend on any ratification by the mortgagors, but on what took place between the mortgagees and the buyers from them.

Ultimately a company was formed. It was registered on the 2nd of March, 1886, and on the 10th the property was conveyed to the company for £8100, that is, for £7700, plus a further sum of £400 added to cover a sum which had become payable to the landlords. The property was then mortgaged by the company for part of the purchase-money to the mortgagees, who thus became liable to account to the mortgagors for the whole price:

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Davey v. *Durrant* (1). Mr. *Farrar* took shares in the company, and was its solicitor, and in the matter of the conveyance he acted on behalf of himself and co-mortgagees on the one side, and of the company on the other, but this was merely formal work consequential on the previous agreement entered into in November. When the sale was completed the power had become exercisable, for although the six months' notice had not expired the interest was more than three months in arrear.

The evidence shews that the transaction was thoroughly honest and fair, and, notwithstanding its suspicious appearance, the company has proved its validity.

If the allegations in the statement of claim had been proved, the sale could not have stood, nor could it have stood if when the agreement for sale was made Mr. *Farrar* had been directly or indirectly one of the buyers. His subsequent conduct does not invalidate the sale then agreed to and afterwards carried out.

Great reliance was placed in argument on *Ex parte Badcock* (2) and *Turner* v. *Trelawny* (3), both of which arose out of the bankruptcy of a part owner in a Cornish mine. The facts were complicated, but in substance they amounted to a sale by *Grylls*, the assignee in bankruptcy, of the bankrupt's shares in the mine to himself, *Grylls*, and other adventurers for the purpose of carrying on the mine. In that case *Grylls* was one of the buyers (partly for his own benefit and partly for *Trelawny's*) and the decree was not that the sale to *Grylls* and his co-adventurers should be set aside, but that *Grylls* and *Trelawny* should be considered as trustees of what they respectively bought, and should account on that footing to the bankrupt's estate. The Plaintiffs in this case are not claiming Mr. *Farrar's* interest in what he sold, that is, his shares in the purchasing company, and it is unnecessary to consider whether they could do so successfully or not. The case relied upon is broadly distinguishable from the present, both in its essential features and in the relief sought.

The other cases relied upon by the Appellants, *e.g.*, *Orme* v. *Wright* (4), *Ex parte Burnell* (5), *Downes* v. *Grazebrook* (6), and

(1) 1 De G. & J. 535.
(2) Mont. & Mac. 231.
(3) 12 Sim. 49.
(4) 3 Jur. 19.
(5) 7 Jur. 116.
(6) 3 Mer. 200.

others of that class, only illustrate the general rule to which reference has already been made. But that rule does not apply to this case.

Mr. *Farrar* was not a trustee selling to himself, or to others for him, nor was he buying directly or indirectly for himself, and although a sale by a mortgagee to a company promoted by himself, of which he is the solicitor, and in which he has shares, is one which the company must prove to have been *bonâ fide*, and at a price at which the mortgagees could properly sell, yet, if such proves to be the fact, there is no rule of law which compels the Court to set aside the sale. *Ex parte Lacey* (1) does not require the Court to hold the sale invalid, however fair and honest it may be, although the judgment in that case does throw upon the company the burden of shewing that the sale was fair and honest. Due consideration for the interests of mortgagors requires this, but no more than this, and whilst on the one hand the principles invoked by the Plaintiffs ought not to be frittered away, so on the other hand they ought not to be extended so as to invalidate honest transactions not really within them. (See *Guest* v. *Smythe* (2) and *Hickley* v. *Hickley* (3).) The sale here impeached having been made honestly and at a fair value, ought, in our opinion, to be allowed to stand, and there is no hard and fast rule which compels us to hold the contrary.

Appeal dismissed with costs.

Solicitors: *Rowcliffes, Rawle, & Co.; Burn & Berridge.*

(1) 6 Ves. 625. (2) Law Rep. 5 Ch. 551.
(3) 2 Ch. D. 190.

H. C. J.

C. A.
1889
Jan. 21.

In re GAITSKELL (A LUNATIC).

Lunatic—Sale under Settled Land Act—Tenant in Tail—Sale of Undivided Shares to co-Owner—Settled Land Act, 1882, *s.* 62.

The Court will give leave to the committee of a lunatic tenant in tail to take proceedings under the *Settled Land Act*, 1882, for the sale of his undivided shares to the owner of the other shares.

In re Weld (1) considered.

MARY CATHERINE GAITSKELL, who had been found a lunatic by inquisition, was the tenant in tail in possession of certain undivided shares in freehold estates of considerable value.

By a provisional agreement dated the 28th of October, 1886, and made between *Ellen Gaitskell*, who was then the committee of the estate of the lunatic, and was also tenant in tail of other undivided shares in the same estate, and *H. P. Senhouse*, it was agreed that *H. P. Senhouse* should purchase the shares of *Ellen Gaitskell* and the lunatic in fee simple for the price therein mentioned.

Ellen Gaitskell died on the 23rd of April, 1888, and the lunatic succeeded to her undivided shares as tenant in tail.

H. P. Senhouse was the tenant for life of the remaining undivided shares of the same estate.

C. B. Gaitskell, who was the heir-at-law of the lunatic, applied to be appointed committee of her estate, and that the provisional agreement of the 28th of October, 1886, might be confirmed, and that he might be at liberty to make such application as might be necessary under the *Settled Land Act*, 1882, for carrying the sale into effect. The Master, by his certificate, found that all these proposals were proper to be carried into effect. Lord Justice *Fry*, however, directed the application to be adjourned into Court. His Lordship was of opinion that there were portions of the contract that needed reconsideration, and also doubted whether, having regard to the decision in *In re Weld* (1), the Court ought to sanction proceedings being taken under the

(1) 28 Ch. D. 514.

Settled Land Act to sell the undivided shares of the lunatic to a co-owner of the same estate.

Cozens-Hardy, Q.C., and *Field*, in support of the application, said that they did not press now for the confirmation of the contract, but they asked that, notwithstanding *In re Weld* (1), the committee, when appointed, might be at liberty to take proceedings under the *Settled Land Act* for a sale of the lunatic's interest to *Senhouse*. The 62nd section of that Act provides that where a tenant for life, or person having the powers of a tenant for life, is a lunatic so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, &c., exercise the powers of a tenant for life under that Act. The application in *In re Weld* was made under the 124th section of the *Lunacy Regulation Act*, 1853, and did not govern this case.

COTTON, L.J.:—

We cannot confirm this contract, for we have not gone into the objections to it. But we are willing to authorize in general terms the committee to take proceedings under the *Settled Land Act* for the purpose of selling the undivided shares of the lunatic to the co-owner of the estate.

LINDLEY and LOPES, L.JJ., concurred.

Solicitors: *Field, Roscoe & Co.*

(1) 28 Ch. D. 514.

M. W.

C. A.
1889
KAY, J.
Jan. 18.
C. A.
Jan. 30.

In re LITTLE.
HARRISON *v.* HARRISON.

[1888 L. 3068.]

Married Woman—Restraint on Anticipation—Release of Restraint—Conveyancing and Law of Property Act, 1881, *s.* 39—*Release of Power.*

The power which the *Conveyancing and Law of Property Act*, 1881, s. 39, gives to the Court of dispensing with a restraint on anticipation is a discretionary power, to be exercised with great caution, and only where a strong case is made for it, and is not necessarily to be exercised because it will be for the benefit of the married woman.

A fund was settled on a married woman for life for her separate use with a restraint on anticipation, remainder to her children and issue as she should appoint, and in default of appointment to the children equally, with cross limitations in the event of any dying under twenty-one without issue. She being in straitened circumstances arranged with her eldest son that his fifth share in a part of the trust funds should be applied in a specified way for her benefit. With a view to this she released her power of appointment over the trust funds, and then applied to the Court to have the fifth share of the son in the agreed part of the funds together with her life interest therein sold, and the proceeds applied as above :—

Held (affirming the decision of *Kay*, J.), that the Court would not in the exercise of its discretion dispense with the restraint on anticipation in order to give effect to a release executed by the donee of the power for her own benefit.

Cunynghame v. *Thurlow* (1) approved.

UNDER the will of *W. B. Little*, dated the 7th of April, 1876, his daughter, Mrs. *Harrison*, was entitled during her life for her sole and separate use, with a restraint on anticipation, to the income of certain parts of his real and personal estate, and after her death the real estate was limited to such uses for the benefit of all or any one or more of her children or other issue born in her lifetime as she should by deed or will appoint, and in default of appointment to the use of her children in fee with cross limitations of the shares original and accruing of each of them on dying under twenty-one without leaving issue. The personal estate was held on similar trusts. The life interest of Mrs. *Harrison* in some part of the property was subject to prior life interests.

(1) 1 Russ. & My. 436.

The income payable to Mrs. *Harrison* under the will was about £230 a year. She had married in 1863 and had five children living, of whom *W. T. Little Harrison* was the eldest and had attained twenty-one. She was past the age of child-bearing.

Mr. *Harrison*, the husband of Mrs. *Harrison*, was adjudicated bankrupt in 1884, and had since been a confirmed invalid, unable to contribute to the support of his family.

On the 25th of January, 1887, an order was made by Mr. Justice *Kay* on the application of Mrs. *Harrison*, under the *Conveyancing and Law of Property Act*, 1881, giving her liberty to bind her life interest in the property for the purpose of raising a sum not exceeding £110.

Mrs. *Harrison* appealed from this order with a view to having it extended, and on the 2nd of February, 1887, the Court of Appeal made an order giving her liberty to bind her life interests, both in possession and reversion under the will, by mortgage for the purpose of raising £300, and to charge her life interests with the payment of the £300 and interest, and of the premiums on a policy of insurance for £350 on her life, notwithstanding the restraint on anticipation. It was ordered that the £300, when raised, should be paid to Mrs. *Harrison's* solicitors, they undertaking, in the first place, thereout to pay off a bill of sale on her furniture; next, to pay the costs therein mentioned; then to pay the first year's premium on the policy and apply the balance in payment of certain scheduled debts. Mrs. *Harrison* undertook that when the bill of sale was paid off the furniture should be assigned to trustees upon trusts for herself and her children so as during her life to be subject to a restraint on anticipation. The £300 was accordingly borrowed from an insurance company on mortgage of the life estate and policy at £6 per cent. interest, reducible to £5 per cent. on punctual payment, and the half-yearly premium on the policy was £7 3*s.* 6*d.*

Part of the property held in trust for Mrs. *Harrison* and her children consisted of £2708 19*s.* 3*d.* New 2¾ per cent. Bank Annuities. In 1888 it was arranged between Mrs. *Harrison* and her eldest son that the mortgage should be paid off if possible by his applying for that purpose his interest in the capital of that sum.

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On the 1st of December, 1888, with a view to this arrangement, Mrs. *Harrison* executed a deed by which she released all the powers conferred on her by her father's will of appointing by deed or will any of the property subject to the will to any uses or upon any trusts in favour of all or any one or more of her children or other issue, to the intent that the limitations in default of appointment might take effect as expressed in the will, subject to the life estate of Mrs. *Harrison* and any prior interests.

On the 13th of December, 1888, Mrs. *Harrison* took out an originating summons against her husband and eldest son, asking that she might be at liberty to release to the son her life interest in his one-fifth share of the £2708 19*s.* 3*d.*, or to accept a release from him of his reversionary interest therein, and that such fifth share might be sold and the proceeds paid to Mrs. *Harrison's* solicitor, he undertaking to apply the same in paying off the mortgage and then in paying the costs therein mentioned, and to hold the balance in trust for Mrs. *Harrison* for her separate use.

Mrs. *Harrison* by affidavit stated that the interest and premium payable under the mortgage amounted to £29 7*s.* a year, and the income of the fifth share of the stock to £14 17*s.*, so that she would gain £14 10*s.* a year by the arrangement, and also have a balance of ready money to receive, which she urgently required. She went on to say "I am in great need of additional furniture for my residence. One of my children has been very ill, and I require money to pay for medical attendance and luxuries which have been necessitated by the child's illness, and I also require funds to complete the payments due in respect of a piano which I have purchased for the purpose of having my daughter taught music so as to enable her to earn her living as a governess, and I also wish to clear off a few small debts so as to be put on a footing of ready money payments."

The summons came on before Mr. Justice *Kay* in Chambers on the 11th of January, 1889, and was heard in Court on the 18th.

Butcher, for the motion, cited *Smith* v. *Houblon* (1), *West* v.

(1) 26 Beav. 482.

Berney (1); *Cunynghame* v. *Thurlow* (2), *Coffin* v. *Cooper* (3), *Campbell* v. *Home* (4), and *M'Queen* v. *Farquhar* (5).

KAY, J.:—

In this case a married woman has been allowed by the Court to mortgage her life estate in a fund, notwithstanding that there was a restraint upon anticipation, which has been suspended for the purpose of that mortgage. She has power to appoint by deed or will among her children, and subject to that power, and in default of its exercise, after her life estate the fund goes among her children equally. There are several children, and of these one son, the eldest, has attained twenty-one since the mortgage was made. Under the advice of some ingenious person the married woman has made this scheme: She releases the power of appointment among her children, and now says, "My eldest son is entitled to an aliquot share of this fund—it is vested now—and he wishes to hand this over to me, and I ask that the restraint on anticipation may be released as to that share, so that it may be handed over to me, and I may apply it in paying off the mortgage." This is a scheme to obtain an aliquot share of this fund for the benefit of the tenant for life, who has this power of appointment.

I was told in Chambers that the Court has no discretion in the matter; that the release is an absolutely good release, and therefore that, as the release is good, and the son says: "I intend to hand this share over to my mother," the Court can do nothing but suspend or release the restraint on anticipation so that the mother may take the share.

That argument is defective in one respect, because the Court has certainly a discretion whether it will suspend the restraint on anticipation or not; and the real question for the Court to consider is, "Is the state of circumstances such, that the Court ought to exercise its discretion by suspending the restraint on anticipation in order to enable this scheme to be perfected?"

No doubt there may be a case in which, where there has been

(1) 1 Russ. & My. 431.
(2) Ibid. 436.
(3) 2 Dr. & Sm. 365.
(4) 1 Y. & C. Ch. 664.
(5) 11 Ves. 467.

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a *bonâ fide* release not made for any corrupt purpose of the appointor, the release is good. But just consider what this power really means. The power to distribute the fund among the children of the tenant for life is a power which contemplates that the circumstances of the family may so alter, that it may be of the highest possible importance to give a larger share to one child than to another. It is a power essentially, in that respect, in the nature of a trust. For instance, it is possible that one child may come into property which may make him independent, while the other children may have nothing to depend upon but this fund. Then it would be an obvious use of a power like this to give a larger share to the children who had no other means. Or again, on the occasion of a marriage or of the advancement of a child, it might become essential to give an immediate share or a larger share to that child. All these are purposes which the donor of such a power as this must be considered to have had in his mind when he created the power.

Now, if this appointor had by deed appointed this fund among all the children equally, for the purpose of having a share handed over to her, that appointment would be clearly bad. I am told that what is now proposed—which is equivalent in effect to that—namely, a release for the purpose of having a share handed over to her, is a matter which the Court cannot interfere with, but must carry out. I will not express an opinion on the matter beyond this, that if I am asked to exercise a discretionary power of suspending the restraint on anticipation for the purpose of perfecting this scheme, I decline to do so. If this is to be done it must be done by a higher authority than mine. I refuse this motion.

G. I. F. C.

C. A. Mrs. *Harrison* appealed. The appeal was heard on the 30th of January, 1889.

Cozens-Hardy, Q.C., and *Butcher*, for the appeal:—

The release of the power of appointment is effectual under the *Conveyancing and Law of Property Act*, 1881, s. 52. The doctrines applicable to exercise of a power for the donee's own benefit do

not apply to a release of a power: *Smith* v. *Death* (1). The power can be released, though it extends to issue as well as children: *Horner* v. *Swann* (2). The power having then been effectually released, one-fifth of this fund belongs to the eldest son in reversion. He is willing to give up his reversionary interest for his mother's benefit, and under sect. 39 of the Act the Court has only to consider whether it will not be for the benefit of the married woman that the restraint on anticipation should be done away with as to this share. That it will be for her benefit is, under the circumstances of the case, clear. If the application is refused the son will probably carry his intention into effect by selling or mortgaging his reversion, which is a much less advantageous proceeding. Mr. Justice *Kay* appears to have relied much on *Cunynghame* v. *Thurlow* (3), but doubt is thrown on that case by *Smith* v. *Houblon* (4), and we submit that it cannot be supported. The Court held that the power was released, and yet, though the donee had thereby become sole *cestui que trust* of a share, the Court refused to pay it to him. This we contend the Court had no jurisdiction to do.

The Defendants did not appear.

COTTON, L.J.:—

This is an appeal by a married woman from a decision of Mr. Justice *Kay* refusing to exercise the power given to the Court by the *Conveyancing and Law of Property Act*, 1881, s. 39, to release her life interest in a portion of a settled fund from a restraint on anticipation. When an application for this purpose is made the Court has first to consider whether it is for her benefit that it should be complied with. The words of the Act are, "Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." But under those words it is clear that the Court has a discretion whether it will make the order or not, even though satisfied that it will be for her benefit. To take away the restraint on anticipation is a

(1) 5 Madd. 371.
(2) T. & R. 430.
(3) 1 Russ. & My. 436.
(4) 26 Beav. 482.

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great interference with the powers of settlors, and though the Act gives the Court jurisdiction to do it, a strong case ought to be made before that jurisdiction is exercised.

In order to make it possible to hand over a share of this fund Mrs. *Harrison* has released her power of appointment. I will assume that this release is effectual, and that the power of appointment is gone. But the release was executed in order to enable Mrs. *Harrison* to obtain possession of this share, and even if the release cannot be impeached, I think that the Court ought not to help her to obtain a benefit from executing it. An appointment made for the purpose of enabling the donee of the power to get possession of a share of the fund would clearly be bad. A release of the power with the same object may be good, but I think we should be wrong in exercising our discretionary power in furtherance of that object. *Cunynghame* v. *Thurlow* (1) is in point, and shews that where we have a discretion we ought not to do anything to help a donee of a power to obtain a personal benefit by releasing it.

LINDLEY, L.J.:—

I am of the same opinion. We clearly have a discretion, and I think that we ought not to exercise it for the purpose of enabling Mrs. *Harrison* to obtain a personal benefit by releasing a power which the settlor intended to subsist for the good of the family.

LOPES, L.J.:—

The *Conveyancing and Law of Property Act*, 1881, s. 39, enables the Court to modify the dispositions of settlors by dispensing with a restraint on anticipation, but this is a discretionary power which, in my opinion, ought to be exercised with extreme caution, and only where a very strong case for its exercise is made out. If we acceded to the present application I think we should be holding out encouragement to tenants for life with powers of appointment to form schemes of this kind for getting the benefit of the reversionary interests of their children.

Solicitors: *Mear & Fowler.*

(1) 1 Russ. & My. 436.

H. C. J.

TRADE AUXILIARY COMPANY *v.* MIDDLESBOROUGH AND DISTRICT TRADESMEN'S PROTECTION ASSOCIATION.

C. A. 1888 CHITTY, J. *Dec.* 21. C. A. 1889 *Feb.* 6.

[1888 T. 2020.]

Copyright—Newspaper—Articles composed at the joint Expense of Proprietors of several Newspapers—5 & 6 *Vict. c.* 45, *ss.* 18, 19 [*Revised Ed. Statutes, vol. viii., p.* 1158].

The three several proprietors of three several periodicals jointly employed a person to compile for them lists of registered bills of sale and deeds of arrangement, on the terms that the copyright was to belong to the three proprietors. The three periodicals were registered under the *Copyright Act*. The compiling these lists required skill, and involved a good deal of labour and expense. The Defendant association copied and circulated among their own members so much of these lists as related to their own neighbourhood, which was a very small part of the whole. The three proprietors sued to restrain this proceeding:—

Held, by the Court of Appeal (affirming the decision of *Chitty*, J.), that the statute 5 & 6 Vict. c. 45, s. 18, was not to be construed as confining the copyright of a proprietor of a newspaper to articles composed on the terms that the copyright should belong to and be paid for by him alone, that each of the three proprietors had an interest in the copyright of the lists, that having registered his periodical he had a right to sue to restrain infringement, and that the Defendant association could not escape on the ground that it had only copied a small portion of the lists.

THE Plaintiffs in this action were the *Trade Auxiliary Company, Limited*, *W. Cate*, and *W. R. Perry*. The *Trade Auxiliary Company, Limited*, were the proprietors of *Stubbs' Weekly Gazette*, which is a publication registered under 5 & 6 Vict. c. 45. The Plaintiff *William Cate* was the proprietor of a weekly gazette or periodical called the "*Commercial Compendium*," and the Plaintiff *W. R. Perry* was the proprietor of a weekly gazette or periodical called "*Perry's Gazette*," both of which had also been registered under 5 & 6 Vict. c. 45. An important feature in each of the three publications was a list of bills of sale registered under the *Bills of Sale Act*, 1882, and of deeds of arrangement registered under the *Deeds of Arrangement Act*, 1887. To obtain the necessary information for compiling these lists two persons, *May* and *Brookes*, were employed and paid by the three Plaintiffs at their

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joint cost to extract from the official records the particulars of each bill of sale registered under the Act of 1882, and of each deed of arrangement registered under the Act of 1887. A fee of 1*s.* for each bill of sale, and 2*s.* 6*d.* for each deed of arrangement inspected and extracted, was paid by the Plaintiffs through *May* and *Brookes* to the Government. The amount thus paid by the Plaintiffs in Government fees in respect of bills of sale had for six years averaged £600 a year, and since the 1st of January, 1888, £8 a week had been paid for fees in respect of deeds of arrangement. The Plaintiffs also paid considerable salaries to *May* and *Brookes* for making and compiling the lists.

May deposed that he and *Brookes* had been employed by the Plaintiffs to extract from the records information consisting of the date of the bill of sale, the amount, by whom given, with address and trade, and the person to whom given; the date of the deed of arrangement, when filed, the name and occupation of the person making it, the names of the trustees, the amounts of liabilities and assets disclosed, or the amount of the proposed composition. He stated that to do this effectually required a good deal of time and labour, as the deeds of arrangement had to be perused, and that only an experienced person could effectively extract the information. He went on to say, "The said *E. Brookes* and myself are solely employed in extracting such information with a view to the preparation of the said lists, and are employed only by the Plaintiffs, and upon the terms that the copyright therein should belong to the Plaintiffs; and neither the said *E. Brookes* nor I claim any interest in the copyright of the lists so compiled by us." *Brookes* deposed, "Such information is extracted by me and the said *W. T. May*, and we are paid on the express terms that the copyright thereof shall be the property of the Plaintiffs."

The Defendant association was a limited company formed for the protection in trade of its members, who were tradesmen in *Middlesborough* and its neighbourhood. It issued to its members a weekly list, which contained, among other things, particulars taken from the Plaintiffs' list of such of the bills of sale and deeds of arrangement as were of local interest in *Middlesborough*.

The Plaintiffs having, by means of fictitious entries in their

own lists, which were copied into the Defendants' lists, ascertained that the Defendants were copying, brought their action to restrain the Defendants from printing, publishing, or causing to be printed or published, selling, delivering, or otherwise disposing of a list or gazette containing any list of deeds of arrangement registered and bills of sale registered, or re-registered, or other information copied or printed by the Defendants from the lists published by the Plaintiffs in their papers.

Taylor, the secretary of the Defendant association, deposed that the association was a subscriber to *Stubbs' Weekly Gazette;* that the association weekly caused all the purely local details to be picked out and entered on a single sheet of paper, a copy of which, marked "private," was sent to each of its members; that there was no publication of the paper; that it did not comprise anything but matters affecting the district, and was only circulated among members of the association; that no special charge was made to the members for it; and that the Plaintiffs sustained no loss. He submitted that the compilation of the lists consisting simply of extracts from documents in the public offices required no skill.

One of the directors of the *Trade Auxiliary Company*, in reply, denied that the Defendant association was a subscriber to *Stubbs' Weekly Gazette*. He said that *Taylor* had become a subscriber as an individual and on the terms that the information furnished should not be divulged to any third party.

The Plaintiffs moved for an injunction before Mr. Justice *Chitty* on the 21st of December, 1888.

Romer, Q.C., and *McKenna*, in support of the motion.

Maidlow, for the Defendants:—

The Defendants have not made any substantial misuse or unfair use of the Plaintiffs' published lists. All they have done has been to take some four entries a week out of four hundred; and, on the principle *de minimis non curat lex*, the Court will not interfere. Next, having regard to the fact that the Plaintiffs' agents have compiled their lists by simply copying, without original composition, the official indexes, in which they have no

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copyright, the Plaintiffs cannot claim any copyright in their lists. But assuming that the Plaintiffs can claim any copyright, their title, as publishers of a periodical work, who have employed persons to compose the same, or any articles or portions thereof for publication in or as part of the same, must rest on sect. 18 of the *Copyright Act*, 1842 (5 & 6 Vict. c. 45); and payment must be actually made to the compiler of the list or composer of the article before the copyright can arise under that section; it is a condition precedent to the vesting of any copyright in the proprietor of the publication that payment should have been actually made to the composer of the article, or, in this case, the compiler of the lists: *Richardson* v. *Gilbert* (1); *Brown* v. *Cooke* (2); and any copying which has taken place before the copyright has vested in the Plaintiffs is perfectly immaterial: *Tuck & Sons* v. *Priester* (3). On the affidavit of *Brookes* and *May* it does not appear that payment had been made to them before publication of the lists by the Plaintiffs. I further submit that as the statute speaks of one registered proprietor only the copyright cannot be split up by three independent publications separately registered combining to employ the same author or authors, and then setting up three co-ordinate copyrights in the same matter.

Romer, in reply, referred to *Walter* v. *Howe* (4).

CHITTY, J.:—

The first of the many questions which the ingenuity of counsel has suggested and argued is, that what is taken is so small that the rule *de minimis non curat lex* applies. In regard to that it appears that the Defendants are a trade society, and they take from *Stubbs' Gazette* all the information, copying it bodily, in regard to bills of sale and deeds of arrangement which will be useful to the members of the society, which is called the *Middlesborough and District Tradesmen's Protection Association, Limited*, and that name sufficiently indicates the nature of the Defendant society. That there is copying is clear, because the Plaintiffs, suspecting for some time that there was copying, invented some

(1) 1 Sim. (N.S.) 336.
(2) 11 Jur. 77.
(3) 19 Q. B. D. 629.
(4) 17 Ch. D. 708.

harmless name and some harmless and innocent bill of sale and put that into *Stubbs*, and it appeared forthwith in the Defendants' publication. The Plaintiffs, in other words, employed what is by no means an uncommon mode of detecting the literary pirate, by the mistakes in the author or proprietor of the copyright's own work being repeated in the pirate's work. In other words, it shews that it is a slavish copy.

Now as to the amount. The Defendants, as I say, take all that part which is material to them, and they take it for the same purpose, viz. for giving information to tradesmen in the district. Then as regards the quantity that is in any particular number, it cannot be great, because the district is not very large; but it is not the case of a single taking. It is obviously, on the evidence, a case of taking week by week. Then it is a taking for the same purpose. It is therefore taking for a competing purpose, and I think the first point must be decided in favour of the Plaintiffs—that the piracy is of that character that an injunction ought to go against the repetition of it, but, of course, not against the repetition in respect to that in which the Plaintiffs at the present moment have no copyright, viz. their unpublished matter.

The next point that was raised was with regard to the persons who had been employed to compose the work, and it was said that sect. 18 (5 & 6 Vict. c. 45) applied, as unquestionably it does. It is necessary to shew that the payment has been made before (it was put) the copyright passes, or at any rate before the action can be brought. Now, as has been pointed out, the part of the sentence "paid for by such proprietor" is not grammatical, and it is quite clear that the proprietor of a magazine or periodical which has been registered cannot bring his action —until he not only is registered, but has also paid the person who has composed the article for him. The evidence shews that the articles were composed for the Plaintiffs—I am speaking generally now—and shews payment. But an ingenious analysis of the affidavits has been submitted to me to shew that the affidavits mean payment after the lapse of some time,—not until after the piracy. I decline to read the affidavits, which appear to me to be sufficiently well framed for this purpose, in that

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sense; and if there was anything in this point about payment, it ought to have been supported either by cross-examination, or by some suggestion at least in the way of challenge on the affidavits. The point is one which is due only to the ingenuity of counsel.

Then there is another point on the evidence also, which is hardly worth mentioning. It was said that the Plaintiffs employed persons merely to copy the indexes which are exhibited at the Office of Bills of Sale and Deeds of Arrangement; and I was told during the argument that the Treasury claimed the copyright to these indexes. This point, however, is of no avail, because the evidence shews that the persons employed by the Plaintiffs do not simply copy the indexes, but go to the instruments themselves, paying a fee of 1*s.* in one case and 2*s.* 6*d.* in the other, a sum which amounts to a very considerable amount in the year. That point therefore fails on the evidence.

Now comes an ingenious point on sect. 18, which is intended to be a point of law. It is said that the section does not allow an author to compose for two periodicals, and that all that is permitted is that he should compose for one exclusively, in order to confer the copyright on the proprietor. This section says nothing about one proprietor only or one periodical only. It is an argument that is built upon an examination of the language of the section, and is founded principally on certain words which are not there to be found. I am at a loss to understand what sense there is, or what principle there is, in the argument. This 18th section, when fairly examined, comes to this: the author of a literary work is the proprietor of the copyright under the general sections of the Act. If it is unpublished matter, probably the better term is to say that his right is to prevent anybody else from publishing. If it is published matter, then his right is a true copyright, and it is to prevent anybody else from multiplying copies, and that right is vested in him; and it was a slip in the argument to suggest that it does not vest in him until he is registered. The registration of a copyright under this Act is only a condition precedent to suing. Then comes this 18th section, the short effect of which is to transfer for a limited period a portion of the copyright to the proprietor of the periodical for whom the article has been

composed; it being a condition that there shall not only be a composition of the article on the terms that it shall belong to the proprietor or publisher, but also that the sum agreed to be paid has been paid. The *Trade Auxiliary Company* is the proprietor of *Stubbs' Gazette*; the Plaintiff *Perry* is the proprietor of *Perry's Gazette*; and the Plaintiff *Cate* is the proprietor of the *Commercial Compendium*. The persons who are employed to do the work are employed by all three of these Plaintiffs on the terms mentioned, and the publications are the same, and there is an infringement by the Defendants of the copyright not merely of *Stubbs' Gazette*, but also of *Perry's Gazette* and the *Commercial Compendium*. The actual copying, as shewn by the evidence, took place from *Stubbs' Gazette*. What principle or what good sense is there in putting a construction on the section which will not allow all these three Plaintiffs to sue? Of course, misjoinder in the present day is out of the question; but why am I to hold that the first Plaintiff, who is the proprietor of *Stubbs' Gazette* (taking that by way of example, that being the *Gazette* which is actually copied), is not a transferee by virtue of sect. 18 of a limited portion of the copyright in that particular composition? I can see no reason for saying that at all. Supposing two newspapers, there being some matter of importance and public interest which was occurring abroad, employed the same literary correspondent to describe the events that were occurring; and supposing the newspapers did (what some of the newspapers at all events do not do)—registered their newspapers—of course, without that they could not sue—and the correspondent went out and sent identical despatches to each newspaper, and he was employed on the terms that the copyright should pass from him to the proprietors of the newspapers, and on the terms of being paid, and he was paid: could not, under those circumstances, the newspapers sue? I agree that is very much the same thing as in this case. I cannot find the slightest reason for saying that in that case the two newspapers could not sue; and here the proprietors of the three periodical publications have combined to sue in order to obviate the objection which might possibly have been raised if the proprietor of *Stubbs' Gazette* alone had sued. I think the construction attempted to be put on sect. 18

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is erroneous, and would work injustice and interfere to the prejudice of authors, with their making a fair and proper use of their talents in the literary market. I therefore hold that the Plaintiffs are entitled to an injunction, limited, of course, as Mr. *Romer* has said he intends to limit it, to the existing copyright in the existing articles. The injunction goes as to the future, but only as to the future in respect of those articles.

F. G. A. W.

C. A.

The Defendant association appealed. The appeal was heard on the 6th of February, 1889.

Maidlow, for the appeal:—

I contend that the Plaintiffs cannot club together to employ an author and then set up three separate copyrights. Copyright is an individual and exclusive thing. There cannot be three distinct copyrights in the same production. If the three Plaintiffs are held to have a joint copyright in the lists they cannot sue, because there is no joint registration. To enable a proprietor of a newspaper to sue for piracy of an article the newspaper must be registered, and there must be proof that the article was written on the terms that the copyright shall belong to the proprietor of the newspaper: *Walter* v. *Howe* (1). Here the copyright was not to belong to the proprietor of any one of the papers. Lord *St. Leonards* in *Jefferys* v. *Boosey* (2) lays down distinctly that copyright is one and indivisible—a right which may be transferred, but cannot be divided. If it cannot be divided after it is created, *à fortiori* it cannot be created in a divided form. If we take it, as Mr. Justice *Chitty* does, that the case is as if the author assigned the copyright to the proprietor of the newspaper, then in a case like this it is as if the author made three several assignments to three distinct people. That cannot be a valid disposition. By sect. 18 of 5 & 6 Vict. c. 45, the author must be employed on the terms that the copyright shall belong to the person who employs him, and under sect. 19 the proprietor of the newspaper who registers his newspaper is entitled to the benefit of the Act, but that does not give

(1) 17 Ch. D. 708.

(2) 4 H. L. C. 815, 992.

him copyright in something contained in the paper which does not satisfy the condition in sect. 18 that it must have been written on the terms that the copyright shall belong to him. I admit that there is enough skill displayed in the lists to defeat the argument that they are only transcripts of public documents, but I submit that the extracting from the Plaintiffs' lists the small portion which was wanted for *Middlesborough* is a proceeding, which the Court will not restrain; it is a legitimate use of a published list.

Romer, Q.C., and *McKenna*, for the Plaintiffs, were not called upon.

COTTON, L.J. :—

This is an appeal from an order for an injunction granted by Mr. Justice *Chitty* against the proprietor of a publication called *The Middlesborough and District Tradesmen's Protection Association, Limited*, to restrain them from copying from certain papers published by the Plaintiffs lists of registered bills of sale and deeds of arrangement. Those lists are made out by two gentlemen who are employed by the proprietors of the three papers, to make extracts from the records of bills of sale and give certain abstracts of deeds of arrangement, on the terms that the copyright shall belong to those three proprietors, and that they pay the compilers for it. I consider the result of the evidence to be that this was the agreement between the proprietors of these three papers and the gentlemen whom they employed, and that they paid those gentlemen before the time when it is alleged that there was any infringement.

Now it has been very ingeniously urged upon us that that agreement has not been so carried out by the proprietors that they can sue. What has been done is this. Each of the proprietors has registered his own separate paper, and it is said that there is no registration of the copyright, and that the Act requires the title to the copyright in respect of which the action is brought to be stated on the registry, that the Plaintiffs have a joint right in the copyright, and that what they have registered is their separate rights in the individual papers. Now, according

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to the opinion of the Master of the Rolls in *Walter* v. *Howe* (1), which I think is correct, all that the Act requires is, that before a newspaper proprietor having a right under sect. 18 can sue, he must register his paper. He does not register the copyright in the article which is prepared on the terms that he is to have the copyright, and in respect of which, therefore, he has the same right as if he were the author and had copyright, but he registers his paper, and that alone gives him a right to sue. What does he get under sect. 18? He gets this—that if he enters into an agreement with anyone to have work done for his paper on those terms then he is entitled to the same right as if he were the author or as if he had got the copyright assigned to him. In my opinion there is nothing in that to prevent such an arrangement as has been made in this case. Three newspaper proprietors join together to employ an author to write an article on the terms pointed out by sect. 18, and, that being so, they have in respect of their newspapers the right of protecting the article and preventing others from infringing their copyright. There can be no possible doubt I suppose, even according to Mr. *Maidlow's* view, that if one of the three proprietors had bought the copyright and then licensed the others each would be able to sue in respect of infringement. In my opinion there is nothing in the Act to prevent a joint ownership in the proprietors of several newspapers of copyright in an article, nor to prevent the owner of one of those separate papers, if he has otherwise complied with the requisitions of the Act, from suing to protect the article. What Mr. *Maidlow* relied on was an opinion expressed by Lord *St. Leonards* in *Jefferys* v. *Boosey* (2). What the Lord Chancellor was dealing with there was an entirely different matter. In that case there was an attempt to assign a copyright so far only as it related to one particular portion of the Queen's dominions and not to the rest, and what Lord *St. Leonards* says is that that cannot be done. The only copyright there was which could be assigned was a copyright effectual over all the Queen's dominions, and not simply over a limited portion of them, and it could not be split up in the way there attempted. That is quite different from the present case. Sect. 18 points out that there may be two

(1) 17 Ch. D. 708. (2) 4 H. L. C. 992.

separate copyrights in the same work, a copyright in respect of publication of the articles in the paper, and copyright in respect of their publication as a separate book. Here what is sought to be protected is only this article in the paper, and all that is required by the Act, in my opinion, is, that before the proprietor of the newspaper can sue he shall register his newspaper, not his copyright in this particular article. In my judgment therefore the decision is right, and the appeal fails.

LINDLEY, L.J.:—

Mr. *Maidlow* has argued this case with considerable ingenuity, but before proceeding to notice his argument it is important to bear in mind the admission which he has made, viz. that these lists are in some sense original publications; that is to say, that the author of them, or the composer of them as he is called in sect. 18, has bestowed some brainwork upon them, and that they are not a mere collection of copies of public documents. If they had been such mere collections there might have been some question, but there has been an abridgment and mental work and an amount of labour which entitles the author of the work or the composer of it—for I take those two words to mean the same thing—to a copyright.

That being conceded, the next question is whether there has been a sufficient registration, and that is the only point of any importance which Mr. *Maidlow* has insisted upon. Now the answer to his argument, ingenious as it is, is to be found by attending to the distinction between copyright and that which has to be registered. Copyright in the articles is created by sect. 18, but what has to be registered is something totally different. What has to be registered is pointed out in sect. 19, which must be read in connection with the other registration section, sect. 13. What you register (although it is common to speak of registering copyright) is not copyright. You do not register copyright, you register a book, you register a publication, and whether you look at the 13th section, which relates to books in general, or whether you look at sect. 19, which relates to periodicals, you find the same thing. What these gentlemen have done is to follow exactly sect. 19, and it is only by

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confusing the copyright and the thing to be registered that any difficulty arises. It appears to me that there is nothing either in the policy or in the language of the Act which prohibits an arrangement of this kind, and sect. 19 is literally complied with, by the registration of the three papers. It appears to me, therefore, that Mr. *Maidlow's* argument falls to the ground.

LOPES, L.J. :—

The registration point is the only point that it is material to consider in this case. When the *Copyright Act* is carefully looked at it appears to me quite clear that what has to be registered is not the copyright in the articles. What the Act requires, having regard to sects. 18 and 19, is this, that each proprietor shall register his own paper. Now in this case that has been done, and I think therefore that the Plaintiffs are in a position to sue, and that this appeal ought to be dismissed with costs.

Solicitors: *McKenna & Co.*; *Wontner & Sons.*

H. C. J.

C. A. 1889 *Feb.* 7.

In re BIRCHALL. BIRCHALL *v.* ASHTON.

[1888 B. 100.]

Trustee—Disclaimer by Conduct—Legal Estate.

Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate.

THIS was an appeal from a judgment of Sir *H. F. Bristowe,* the Vice-Chancellor of the County Palatine of *Lancaster.*

W. Birchall by his will, dated the 3rd of October, 1876, appointed *W. Birchall* and *Joseph Ashton* his trustees and executors: and devised his residuary real and leasehold estates to his trustees upon certain trusts for the benefit of the Plaintiffs during their lives and after the death of the survivor upon trust to sell and apply the proceeds as therein mentioned. The testator died in July, 1878.

W. Birchall, the trustee, proved the will and acted in the administration of the trusts. He died in February, 1888.

J. Ashton did not prove the will, and there was no proof that he ever acted as trustee during the life of *W. Birchall;* and there was evidence that soon after the testator's death he told the Plaintiffs that he had not acted, and would never act, and that he would not prove the will. But he never renounced probate or executed any deed disclaiming the trusts of the will. When *Birchall* died the solicitor who conducted the business asked *Ashton* whether he would now act, but he said he would not act unless he was remunerated for his trouble.

On the 12th of May, 1888, the Plaintiffs brought the present action against *Ashton*, asking that two new trustees might be appointed.

On the 29th of May *Ashton* executed a deed under the *Conveyancing and Law of Property Act*, 1881, appointing *G. J. Healey* a trustee jointly with himself of the trusts of the will, and vesting the real and personal property in them jointly. The statement of claim was accordingly amended, and *Healey* was added as a Defendant.

Ashton was not examined as a witness by either party.

The Vice-Chancellor held upon the evidence that *Ashton* had disclaimed the trusts of the will, and that *Healey* was not duly appointed a trustee, and referred it to the Registrar to approve of two new trustees. And he further ordered that *Ashton* should, at the expense of the estate, execute a proper conveyance of the estate, subject to the trusts of the will, to the new trustees when appointed.

From this judgment the Defendants appealed.

Neville, Q.C., and *Rotch*, for the Appellants:—

There is no sufficient evidence that *Ashton* has disclaimed the trusts. He has not disclaimed on record or by deed, nor has he done anything inconsistent with the office of trustee. There is nothing proved but conversations, and there is no authority for holding that mere words are a sufficient disclaimer: *Peppercorn* v. *Wayman* (1); *Stacey* v. *Elph* (2). It is necessary to give some

(1) 5 De G. & Sm. 230. (2) 1 My & K. 195.

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unambiguous evidence of intention. If *Birchall* had committed a breach of trust and the Plaintiffs had taken proceedings against *Ashton* for wilful default he would have had no answer to the action.

If the Judge was right in holding that *Ashton* had disclaimed, he was wrong in directing him to execute a conveyance to the new trustees. The two parts of the judgment are inconsistent.

Crackanthorpe, Q.C., and *T. R. Hughes*, for the Plaintiffs :—

The evidence is quite sufficient to shew that *Ashton* has disclaimed the office of trustee: *Stacey* v. *Elph* (1); *White* v. *M'Dermott* (2). With respect to the legal estate the direction to convey was inserted *ex abundante cautelâ*. The disclaimer of the office of trustee is a different matter from the disclaimer of the legal estate, and there is some doubt whether a more formal act is not required in the latter case than in the former: *Lewin* on Trusts (3); *Doe* v. *Harris* (4).

Neville, in reply.

COTTON, L.J. :—

This is an appeal against the judgment of the Vice-Chancellor of the County Palatine, who has decided that the Defendant *Ashton* has never acted in the trusts of the will, and has refused to accept the office of a trustee. It is not necessary to say what my conclusion might have been if the evidence had come before us in the first instance. There was some evidence in favour of the conclusion at which the Vice-Chancellor arrived, that *Ashton* had never acted in the trusts or accepted the office of trustee, and he was not put into the witness-box and asked whether he had ever acted. It is impossible for us in this state of circumstances to reverse the decision of the Vice-Chancellor on this point. But with respect to the latter part of the judgment of the Vice-Chancellor, I do not think it is correct. It was contended that there was no evidence that *Ashton* had disclaimed the legal estate, even if he had disclaimed the office of trustee. I should

(1) 1 My. & K. 195.
(2) I. R. 7 C. L. 1.
(3) 8th Ed. p. 198.
(4) 16 M. & W. 517.

be sorry that it should be thought that a trustee could disclaim the office of trustee, and nevertheless take the legal estate. Therefore, we must strike out that part of the order.

LINDLEY, L.J.:—

I am of the same opinion. There was evidence that *Ashton* had not acted, though he was not asked in the witness-box whether he had done so. But the Vice-Chancellor had all the evidence before him, both words and conduct, and he came to the conclusion that *Ashton* had disclaimed the trusts, and I think I should have arrived at the same conclusion. Mr. *Rotch* argued that upon the facts as proved *Ashton* would have had no defence if he had been accused of wilful default. That would depend upon whether he was informed of what took place. Each case depends upon its own facts. All we know is that he said in the conversations, which were proved, that he had not accepted the trusts, and he was not asked in the witness-box whether he had acted.

Then we come to the question as to the legal estate. Formerly it was held that the legal estate in freeholds could not be disclaimed except by record: but that doctrine was given up, and it was held that the disclaimer could be by deed. Since that the law has been carefully considered, and it is now established that a man's assent to a devise is presumed unless he disclaims, which may be by conduct as well as by record or by deed. The Vice-Chancellor came to the conclusion that *Ashton* had never accepted the trusts, and on the same evidence he must be taken never to have accepted the legal estate. The order must, therefore, be varied in that respect. It may seem hard upon *Ashton*, but I think the Defendants must pay the costs of this appeal.

LOPES, L.J.:—

I am of the same opinion. It is well settled that an estate may be disclaimed by conduct without any express declaration of disclaimer. The question in this case is one of fact, not of law. What is the effect of the evidence by which the Vice-Chancellor was satisfied that *Ashton* had disclaimed the trusts? It was argued that there was no evidence of anything but conversation. But the subsequent conduct of *Ashton* in not acting for nine

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years must be taken into account. On the whole evidence I am of opinion that the Vice-Chancellor was justified in coming to the conclusion at which he arrived.

With regard to the legal estate, I think that the result of the disclaimer was that the legal estate did not pass to *Ashton*. That part of the order must therefore be struck out.

As to the costs, *Ashton* has brought this litigation on himself, and the Defendants must pay the costs of this appeal.

Solicitors: *A. S. Mather, Liverpool; Tyrer & Mackenzie, Liverpool.*

M. W.

In re GREVILLE'S SETTLEMENT.

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Nov. 14; *Dec.* 11.

Solicitor and Client—Remuneration—Scale-charge—Sale—Land out of Jurisdiction—Irish Land—Lord Ashbourne's Act, Purchase of Land (Ireland) Act, 1885 (48 & 49 *Vict. c.* 73)—*Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order under Rule* 2 (*a*), *Sched. I., Part I.*

The General Order under the *Solicitors' Remuneration Act*, 1881, fixing a scale charge does not apply to a sale of land not situated in *England*.

Thus, where an English solicitor carried out a sale under *Lord Ashbourne's Act*, the *Purchase of Land (Ireland) Act*, 1885, of land in *Ireland* belonging to a client, and employed an Irish solicitor to do so much of the work as had necessarily to be done in *Ireland*:—

Held, that the English solicitor's remuneration was not regulated by Sched. I. part I., to the General Order under the *Solicitors' Remuneration Act*, 1881.

SUMMONS to review taxation.

In February, 1886, Mr. *Greville*, who was, under his marriage settlement, dated in 1870, the tenant for life of certain estates in the county of *Roscommon* in *Ireland*, consulted an English firm of solicitors in *London* with reference to a proposed sale of portions of the estates to the tenants under the provisions of *Lord Ashbourne's Act*, "The *Purchase of Land (Ireland) Act*, 1885." Preliminary negotiations with the tenants were then made by an Irish land agent on Mr. *Greville's* behalf, and the sales were eventually carried out and completed under the powers of that Act through the English firm, who prepared the abstracts of title, and did all the work which could be done in *England;* but, in order to complete the sales and to carry out the legal work which, under the rules of the Irish Land Commission, had necessarily to be done in *Dublin*, they employed a firm of solicitors in *Dublin*.

In May, 1888, the English firm delivered to Mr. *Greville* a detailed bill of costs in relation to the sales in accordance with Schedule II. to the General Order under the *Solicitors' Remuneration Act*, 1881. They also delivered a cash account, including the charges of the *Dublin* firm, of which the English firm had themselves already paid part and subsequently paid the remainder.

No election had been made by the English firm under rule 6

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of the General Order under the *Solicitors' Remuneration Act*, 1881, to accept their remuneration according to the old practice as altered by Schedule II. to the General Order.

On the 10th of July, 1888, Mr. *Greville* and the trustees of his settlement applied for and obtained the usual order for taxation of the bill, and the bill was duly taxed thereunder. Subsequently the Applicants carried in objections to the Taxing Master's certificate on the ground that the bill, so far as it related to completed sales, should have been made out according to the scale in Sched. I., part I., to the General Order under the *Solicitors' Remuneration Act*, 1881, and that the scale-charge only should be allowed in respect of such sales, together with the other allowances under paragraph 4 of such General Order. The Taxing Master overruled these objections, stating in his answers to them that all the sales which were completed were carried out under *Lord Ashbourne's Act* through the Land Commission in *Dublin*; that the *Dublin* firm transacted that part of the business which could not have been transacted in *England*; that Schedule I. of the General Order under the *Solicitors' Remuneration Act* did not apply to property out of the jurisdiction of the Supreme Court; that *Lord Ashbourne's Act* provided that the Irish Lord Chancellor should make a General Order with respect to the remuneration of solicitors in *Ireland*; and that the Order which was in fact so made regulated the charges of the *Dublin* firm, but that the charges of the English firm were governed by Schedule II. of the General Order under the *Solicitors' Remuneration Act*.

Mr. *Greville* and his trustees then took out this summons to have the objections to the taxation allowed, and the Taxing Master's certificate referred back to him to be varied accordingly.

Sect. 21 of *Lord Ashbourne's Act, Purchase of Land (Ireland) Act*, 1885, is as follows: "Rules for carrying this Act into effect shall be deemed to be rules under the *Land Law (Ireland) Act*, 1881, and shall be made by the Land Commission accordingly, and forms and tables shall be settled or adapted by the Land Commission for the purposes of this Act."

On the 5th of December, 1887, rules were issued by the Irish Land Commission under the *Irish Land Acts*, including *Lord Ashbourne's Act*, in relation to the acquisition of land by tenants,

it being provided by rule 107 that, in the absence of any special agreement between a solicitor and his client, the costs of sales and proceedings under the Act should be regulated partly by the schedule of fees in the appendix to the rules, partly by the schedule of fees then in force in relation to proceedings before the Land Judges, and partly by the schedule of fees in force before the General Order in *Ireland* under the *Solicitors' Remuneration Act*, 1881, as amended by Schedule II. to such General Order.

Millar, Q.C., and *R. F. Norton*, for the clients:—

We submit that the solicitors are only entitled to the scale-charge allowed by Sched. I., part I., to the General Order under the *Solicitors' Remuneration Act*, 1881. That Act applies to *Ireland*, and is, in fact, independent of locality: rule 2 (*a*) of the General Order, in requiring that sales and purchases shall be regulated by part I. of Schedule I. contains no limit as to place. Any payments made by the English firm to the *Dublin* firm should, we admit, properly be allowed to them under rule 4, as disbursements, in addition to the remuneration prescribed by Schedule I.

The principles of remuneration laid down by sect. 4 of the Act apply equally to *Ireland* as to *England*.

Marten, Q.C., and *Warrington*, for the English solicitors:—

We submit that the scale-charge does not apply to purchases and sales of land in *Ireland*, being applicable only to the sale of land in *England*. Here the sales were made under *Lord Ashbourne's Act*, and under that Act rules have been issued for the remuneration of solicitors in *Ireland* in the case of any such sale. So that these rules exclude the operation of any others in cases of sales under that Act. In fact, the scale-charge provided by the General Order under the *Solicitors' Remuneration Act*, 1881, can only apply, and is intended only to apply, to the ordinary case of a sale in *England*: it is inapplicable to the peculiar modes of sale under *Lord Ashbourne's Act*, or any other of the *Irish Land Acts*; it is not adapted to any sale of property out of the jurisdiction. The *Solicitors' Remuneration Act* really contemplates rules being made

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by two independent authorities in *England* and *Ireland*; and in point of fact there is a General Order in force under the Act for *Ireland* as distinct from *England*. The English order has no application to Irish property at all. Even assuming the General Order does apply to a sale of property out of the jurisdiction, rule 2 (*a*) directs that the scale-charge is to apply where the solicitor has "the conduct of the business." Here the English solicitors did not have the conduct of the business in *Ireland* relating to the sale. Again, the scale-charge only applies to business the whole of which is done by the solicitor: *In re Lacey & Son* (1). Here the whole of the work relating to the sale was not, and could not have been, done by the English firm.

Norton, in reply:—

The English firm had "the conduct of the business" within rule 2 (*a*). They did the bulk of the work, employing an agent to do what they could not actually do themselves.

KAY, J.:—

A vendor of land in *Ireland*, which was recently sold under *Lord Ashbourne's Act*, complains of the mode of taxation of his solicitors' bill of costs in *England*, on the ground that the Taxing Master has not allowed the scale-fee. He says the Taxing Master ought to have allowed the scale-fee, although the land is in *Ireland*; and he says so because, to use the language of Lord Justice *Lindley* in *In re Lacey & Son*: "substantially the whole of the work mentioned" (in Sched. I., part I. to the General Order under the *Solicitors' Remuneration Act* of 1881), "*i.e.*, deducing the title and perusing and completing the conveyance," has been done by the London solicitors. Now, Sched. I., part I., gives a scale-fee to the vendor's solicitor of so much "for negotiating a sale of property by private contract;" so much "for conducting a sale of property by public auction;" and so much "for deducing title to freehold, copyhold, or leasehold property, and perusing, and completing conveyance (including preparation of contract, or conditions of sale, if any)." The argument is that, the work having been done by the English solicitor, he was

(1) 25 Ch. D. 301, 310.

bound to charge only the scale-fee. If he wanted to protect himself he might, before undertaking the work, have said: "I will not do this work for the scale-fee." Of course the client might have said to the solicitor, "Now mind, before I put the work into your hands you are not to charge the scale-fee." Nothing of that kind was done by either of them. I am now asked to say that the scale-fee applies.

The argument is this: this land is in *Ireland*, but it does not matter where the land is—it may be in any part of the world—and if the English solicitor deduces the title, peruses the conveyance, and completes it by obtaining the vendor's signature or execution, then he is entitled to the scale-fee, and he is bound to charge the scale-fee unless there is a different contract. The question is, what does the *Solicitors' Remuneration Act*, 1881, mean? I look at the Act and I find this. The 2nd section provides that General Orders may be made "for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court;" and so on. Sect. 4 is this: "Any General Order under this Act may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another, or others, and may, as regards the amount of the remuneration, regulate the same with reference to all or any of the following, among other, considerations; (namely,) The position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like: The place, district, and circumstances at or in which the business or part thereof is transacted: The amount of the capital money or of the rent to which the business relates: The skill, labour, and responsibility;" and so on.

Now, it was under and with reference to that Act that the present General Order was made; and, in the first place, I

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observe that there is not a word in the General Order about the place or district in which the business is transacted. The first rule of the Order is as follows: "This Order is to take effect from and after the 31st day of December, 1882, except that Schedule I. hereto shall not apply to transactions respecting real property the title to which has been registered under the Acts"—mentioning certain English Acts. The second rule is this: "Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master, is to be regulated as follows." That follows exactly the words of sect. 2 of the Act of Parliament. Then the rule gives the different classes of business. Sub-rule (*a*) is, "In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in part I. of Schedule I. to this Order, and to be subject to the regulations therein contained."

Now I turn at once to the schedule. It deals separately with sales, purchases and mortgages; and it provides for the remuneration, not only of the vendor's solicitor, but also of the purchaser's solicitor. The argument is that, no matter in what part of the world the sale may be, these rules apply. Take, for example, a remote part of *Russia*; suppose the purchaser to be a Russian subject out there, do the rules apply to him? Most clearly they do not, unless he employs a solicitor in *England*. The real question is, What does the Order mean? The schedule says, with respect to the vendor's solicitor, "for deducing title to freehold, copyhold, or leasehold property," and I have read from the first rule of the Order an exception as to real property, the title of which is registered in *England*. Now "real property" has no meaning with respect to many foreign countries—there is no such thing in our sense; and in this schedule I find this—"Vendor's solicitor for deducing title to freehold, copyhold, or leasehold property." In many countries of the world such a thing as copyhold property was never heard of. Am I to read this Act

as applying to "freehold, copyhold, or leasehold property" in any part of the world, whereas in many parts of the world not one of those three words would have any meaning at all? For instance, I am not sure that "copyhold" has any meaning at all except in *England*. In my opinion that was not the intention of the Act. There are very many reasons indeed why one should not construe the Act as including the sale of property in foreign countries unless one is obliged, and those reasons seem to me to be more in favour of the client than of the solicitor; but, apart from any such considerations, I cannot find in the Act, or in the General Order under it, any intimation that the order is to apply to property which is not in this country, or which, according to the argument, is in any part of the world. It is said that there is no harm in putting that interpretation upon the Act and Order, because in any such case the solicitor can only charge —according to the decision in *In re Lacey & Son* (1)—in case he does all the work, that is, deduces the title, prepares the conveyance, and completes it. Even in the case of property in *England*, he is not entitled to the scale-fee unless he does all that; and of course he would not be entitled to the scale-fee in respect of property abroad unless he does all that. It would be obvious and apparent to every one that, if the sale is of property abroad, although in some sense he would do the work, a great part of the work must of necessity be done over again by some agent employed in the place abroad; and although he might make out an abstract of his own, and peruse the conveyance that is sent over and get his client to execute it, in my opinion he would not bring himself within the General Order.

Take, for example, the case of a sale of land in *New Zealand*. The sale—or at any rate, the conveyance—of land in *New Zealand*, is carried out in a manner entirely different from that in *England*. There is a registration of the assurance, which is not complete and perfect until it is registered. The business is such that an English solicitor, although he might possibly obtain the execution of the instrument of assurance itself, could never be able to carry out without employing a colonial solicitor; and in the case of land in any other foreign country, although the

(1) 25 Ch. D. 301.

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solicitor in this country might bring himself within the letter of this General Order by deducing the title, by perusing the assurance, and by completing it by obtaining the signature of his client, yet by reason of the usage and in most cases the law of the foreign country being different to the usage and law of this country, he must of necessity employ, to do all the essential parts of the work, some skilled person in the foreign country. It is said, "That is right; so he should; and he would be allowed all proper charges for that." But the case now before me is a perfect illustration of the difficulty that would arise from putting that construction on the General Order. Here the sale has taken place under *Lord Ashbourne's Act*. The *Solicitors' Remuneration Act* applies to *Ireland*, and rules are to be made in *Ireland* to carry it out. But in *Ireland* in certain cases *Lord Ashbourne's Act* excludes the application of this Act, and provides for a peculiar mode of carrying out the sale by application to the Land Commissioners' Court, or some Court constituted in *Ireland* which has to watch the proceedings, and especially to secure the money which is charged upon the land and not actually paid over. All that has to be done, and in this case has been done, by solicitors in *Ireland*; and I have a very strong belief that, if the scale-fees were actually charged and there were allowed, besides, such disbursements as were fair and reasonable to the Irish solicitors, the vendor would find it to his disadvantage, for he would have to pay a great deal more than he has to pay under the present taxation. However, I do not find in this Act of Parliament, or in the General Order under it, any indication that the scale-charge is to apply in case of a sale of property out of the jurisdiction of the English Courts, and if that had been the intention I should have expected very much more distinct words to shew it, especially when I find that the Act of Parliament does say that any General Order under it may regulate the charge with respect to the "place, district, and circumstances at or in which the business or part thereof is transacted." I find nothing in this Order to contemplate the transaction of the business of a sale and conveyance of land which is out of the jurisdiction of the Courts of *England*. I wish to put my judgment on the broadest ground possible, because the point

is a very important one and it may be necessary to carry it further now or at some other time; and I hold that the Order under this Act does not apply, and was not intended to apply, to the sale of land which is not in *England*.

I dismiss the summons with costs, including the costs of the reference back to the Taxing Master.

Solicitors: *Bloxam, Ellison & Co.; Collyer-Bristow, Withers, Russell & Hill.*

G. I. F. C.

JAMES *v.* KERR.

[1887. J. 1355.]

Mortgage—Solicitor and Client—Advances—Bonus—Champerty and Maintenance—Collateral Advantage—Expectant Heir—Redemption.

J., a young man in very poor circumstances, was Defendant in a probate action in which he claimed a share of certain real estate as co-heir of the deceased. To enable him to conduct his defence he borrowed money from *K.*, a solicitor, to whom he executed a mortgage whereby he, *J.*, covenanted to employ a particular person as his solicitor in the action, and, if he should be successful in the action, to pay *K.* £225 "by way of bonus;" and it was provided that *K.* should make such further advances to *J.* as and when *K.* should think fit to meet any further necessities of *J.*, or to be applied in or towards the costs of the action. The deed then charged *J.'s* interest in the real estate in question with present and future advances and interest at 5 per cent., and the £225 bonus. *J.* received a further advance from *K.*, making a total of £100 for advances, and was ultimately successful in establishing his claim in the probate action:—

Held, in an action by *J.* to redeem: (1) that the mortgage was tainted with champerty; (2) that the bonus was illegal as being a collateral advantage stipulated for by a mortgagee; and (3) that the transaction was voidable as an undue advantage obtained from *J.* when under the pressure of distress and in a position analogous to that of an expectant heir; and, accordingly, redemption was decreed on payment only of the sums actually advanced to *J.*, with interest.

ON the 6th of June, 1883, *John Hill Morgan* died possessed of certain real estate. His co-heirs were *Herbert James*, the Plaintiff in this action, and one *Green*. After *Morgan's* death an alleged will was propounded which, it was said, had been lost or destroyed, and it was sought to establish it by parol evidence. A suit for that purpose, *Goulstone* v. *Woodward*, was instituted

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in the Probate Division, to which the Plaintiff and *Green* were made Defendants. The Plaintiff was a young man of about 27, clerk to a solicitor named *Thrower*, who acted for him in the litigation; but, in February, 1884, *Thrower* became incapacitated by mental derangement. The Plaintiff was then in very poor circumstances, and pressed by creditors.

The co-Defendant in the probate action, *Green*, was represented by his cousin, a solicitor at *Halifax* named *Jones*, whose *London* agent in the matter was a Mr. *Bridgford*. In February, 1884, the Plaintiff applied to *Jones*, who was his second cousin, for pecuniary assistance. *Jones* thereupon consulted counsel, and in May a draft deed was prepared in the form of a security to *Jones* himself. This draft was read and approved by the Plaintiff. *Jones*, however, instead of lending the money himself, endeavoured to obtain the loan elsewhere, and ultimately applied to the Defendant, *Robert Kerr*, who, with his brother, the Defendant, *John Kerr*, was in practice as a solicitor at *Halifax*. The *Kerrs*, on perusing the draft, agreed to entertain the proposal, and a meeting was arranged at *Bridgford's* office in *London*, at which the Plaintiff, *Jones*, *Bridgford*, and *John Kerr*, were present. After some conversation, upon the Plaintiff's obtaining the papers necessary for the conduct of his defence and handing them to *Bridgford*, Messrs. *Kerr* arranged to advance at once £60; and shortly afterwards the Plaintiff executed to Messrs. *Kerr* a deed of mortgage or charge. The deed was dated the 10th of June, 1884, and was made between the Plaintiff of the one part and the two Defendants *Kerr* of the other part. It recited the death of *Morgan*, and the Plaintiff's claim as one of his co-heirs; also the pendency of the action of *Goulstone* v. *Woodward* in the Probate Court, and that "further proceedings are or may be necessary to enable the borrower to have his rights in the real estate of the said *John Hill Morgan* ascertained and determined." Then it recited that the Plaintiff's former solicitor had become incapacitated, and that the Plaintiff, the borrower, being in immediate want of £60 to meet his necessities, had applied to the *Kerrs*, the lenders, to advance the same, "and also to make further advances as hereinafter mentioned," and that they had agreed to do so. It was then witnessed that it was agreed as

follows: (1) that the borrower should give for the £60 a promissory note, payable on demand, with interest at 5 per cent. "(2) The borrower shall give all necessary authorities and take, or concur in taking, all necessary steps for substituting Mr. *J. H. Bridgford* as solicitor for the borrower in the said action of *Goulstone* v. *Woodward*, in the place of the said *Ernest Thrower*, and will employ him as his solicitor in the conduct of all proceedings for establishing his claim to and gaining possession of his share of the real estate of the said *John Hill Morgan*, and will not, without the consent in writing of the lenders, remove the said *J. H. Bridgford* from such employment as his solicitor, but if he is willing so to act will continue to so employ him until the said action and all such other proceedings as aforesaid shall have been determined or come to an end." Next followed a stipulation that the £60 and further advances should not be called in for two years if the interest was duly paid, unless the borrower should, without consent, cease to employ *Bridgford*, or the action should come to an end. Then it was provided that, if by any means the title of the borrower to any part of the real estate should be established, he should, within three months thereafter, pay to the lenders "by way of bonus" £225. "(5.) The lenders will make such further advances to the borrower as the lenders in their own discretion shall think fit, to meet any further necessities of the borrower, to be applied in or towards the costs and disbursements of the said action or of proving the claim of the borrower to a share of the said real estate," for which and interest the borrower was to give a promissory note, "but the lenders are not hereby placed under any obligation to make any such advance unless they shall at the time think fit to do so." The deed then contained a charge of the advances and interest and the bonus of £225 upon any interest of the borrower in the real estate of *J. H. Morgan*. Subsequently Messrs. *Kerr* advanced to the Plaintiff a further sum of £40 on the security of the deed, making a total sum of £100 due for advances.

It appeared that the draft, which was produced in evidence, suggested a bonus of £300, and that the Plaintiff, under the pressure of his debts and circumstances at the time, was ready to consent to that; but that Messrs. *Kerr* voluntarily reduced it to

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£225. The Defendant, *Robert Kerr*, deposed that he told *Jones*, after reading the draft, that his firm would never advance money for costs, and that *Jones* replied that there would be no necessity, as his client *Green* would do that. *Jones* did not tell the Plaintiff of *Kerr's* objection. He induced *Kerr* to leave the clause as to providing for costs in the deed, but interlined, at *Kerr's* instance, in clause 5 the words, "to meet any further necessities of the borrower," the word "or" being apparently accidentally omitted to be inserted at the end of those words, and immediately before the provision as to future costs.

It appeared that, prior to this security, the Plaintiff had already given his former employer, *Thrower*, a charge on his interest in *Morgan's* real estate for upwards of £400, but that Messrs. *Kerr* were ignorant of the existence of this charge at the time they took their security.

On the 29th of October, 1884, the Court of Probate gave judgment in the probate action establishing *Morgan's* will; but that judgment was reversed by the Court of Appeal on the 4th of July, 1885, and the reversal was affirmed by the House of Lords on the 16th of July, 1886.

On the 8th of October, 1887, the Plaintiff issued the writ in this action against Messrs. *Kerr*, claiming that an account might be taken of the moneys actually advanced by them to the Plaintiff on the execution of the security of the 10th of June, 1884, and that it might be declared that the sum of £225 payable as bonus in the event of the success in the probate action was improperly inserted by them, and made the bargain unconscionable and illegal, and that the deed was void: and that on payment by the Plaintiff, or his subsequent mortgagee, one *Hartland*, who was made a Defendant, of the amount actually advanced on the said security, with interest at 5 per cent. per annum, the Defendants, Messrs. *Kerr*, might be ordered to transfer their debt and release the property to the Defendant, *Hartland*, as such subsequent mortgagee, or to the Plaintiff, if *Hartland* had been paid off: also an injunction to restrain the Defendants, Messrs. *Kerr*, from dealing with their security, the Plaintiff offering to pay the amount found to have been actually advanced, with interest.

In his statement of claim the Plaintiff alleged that, when he executed the deed in question he had no other property beyond such interest as he might establish as heir-at-law in the probate action, and was in the position of an expectant heir: that at the time the mortgage was made he had no money for the necessaries of life or to support himself, his wife and child, or to carry on the probate action; and that the Defendants, Messrs. *Kerr*, took undue advantage of his necessitous position, and obtained an unconscionable bargain from him.

In their defence, Messrs. *Kerr* maintained that the bargain was fair and reasonable; and they alleged that before the Plaintiff gave them the security he perfectly understood he would be required to pay a bonus: that the terms on which the advances were to be made had been fully discussed between the Plaintiff and his solicitor, *Jones*, and that *Jones*, when he applied to Messrs. *Kerr* for the loan, did so as the Plaintiff's solicitor, and that the deed was read out to the Plaintiff before he executed it, and that he fully understood it. Messrs. *Kerr* further alleged that they had no intimation, prior to the issue of the writ in this action, that the Plaintiff repudiated his liability to pay the bonus; and that the Plaintiff had confirmed and acquiesced in the arrangement for payment of the bonus after his interest as heir-at-law had been established in the probate action, and they submitted that he was barred by such confirmation and acquiescence. They further insisted on their right to payment of the bonus of £225, as well as the advances actually made.

The action now came on for trial.

Marten, Q.C., and *Phillpotts*, for the Plaintiff:—

First, the charge of the 10th of June, 1884, is bad on the ground of champerty and maintenance: *Strachan* v. *Brander* (1); *Wood* v. *Downes* (2); *Reynell* v. *Sprye* (3); *Earle* v. *Hopwood* (4); *Hutley* v. *Hutley* (5); *Bradlaugh* v. *Newdegate* (6): *Ball* v. *Warwick* (7). The *Attorneys and Solicitors Act*, 1870, though it

(1) 1 Eden. 303, 308.
(2) 18 Ves. 120, 127.
(3) 1 D. M. & G. 660, 678.
(4) 9 C. B. (N.S.) 566.
(5) Law Rep. 8 Q. B. 112.
(6) 11 Q. B. D. 1, 9.
(7) 50 L. J. (Q. B.) 382; 29 W. R. 468.

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authorizes, in sect. 4, a solicitor to make any agreement with his client, yet, in sect. 11, expressly reserves the law as to champerty and maintenance.

Secondly, the mortgagee's stipulation for a bonus is bad as being a collateral advantage to the mortgagee clogging the redemption, and as such contrary to law: *Jennings* v. *Ward* (1); *Broad* v. *Selfe* (2); *Eyre* v. *Hughes* (3).

Thirdly, the transaction is void as an undue advantage obtained from the Plaintiff while under the pressure of distress and in a position analogous to that of an expectant heir.

Renshaw, Q.C., and *Yate Lee*, for the Defendants, Messrs. *Kerr*:—

The mortgage is not obnoxious to the law of champerty and maintenance, which only prohibits the purchase of an interest for the purpose of maintaining and taking part in litigation relating to that interest, and thus increasing the bulk of litigation: *Stanley* v. *Jones* (4); *Harrington* v. *Long* (5); *Hartley* v. *Russell* (6); *Cockell* v. *Taylor* (7). In the present case the transaction amounted to nothing more than a sale by the Plaintiff of part of his interest in the property the subject of the litigation in the Probate Court: it was not a sale of the right to sue. It was to the advantage of every one interested and to prevent unnecessary costs that these provisions should be inserted in the mortgage for employing and paying one solicitor only.

The doctrines as to clogging the redemption and taking advantage of a person under pressure of distress do not apply to the present case, which was one simply of bargain between the Plaintiff and Messrs. *Kerr* for the purpose of enabling the Plaintiff to prosecute his probate action, which he could not have done without pecuniary assistance. Messrs. *Kerr* incurred the risk of not being repaid at all if that action was unsuccessful, and that risk was properly taken into consideration when the terms on which the advances should be made to the Plaintiff were agreed upon.

(1) 2 Vern. 520.
(2) 11 W. R. 1036.
(3) 2 Ch. D. 148.
(4) 7 Bing. 369.
(5) 2 My. & K. 590, 598.
(6) 2 S. & S. 244.
(7) 15 Beav. 103.

Further, it is clear that the Plaintiff, when he executed the mortgage to Messrs. *Kerr*, concealed the fact that he had already charged his interest in favour of *Thrower*; and he has therefore brought himself within 4 & 5 Wm. & M. c. 16, s. 3, which says that a mortgagor who conceals a first mortgage shall not be entitled to redeem the second.

[KAY, J. :—You have not pleaded that statute.]

Fisher on Mortgages (1) was referred to.

W. C. Fooks, for the Defendant, *Hartland*.

Marten, in reply :—

The statute 4 & 5 Wm. & M. c. 16, is inapplicable, because (1) this is not an action simply to redeem under a mortgage admittedly valid, but to set aside the mortgage itself as invalid, whereas the statute is directed to the redemption of a security assumed to be valid; and (2) the statute is only for the relief of an honest mortgagee, and not of a mortgagee who has obtained his security improperly: *Stafford* v. *Selby* (2). The authorities clearly establish that the Court will not allow a stranger to have an interest in a suit, as for instance, by bargaining for a share in the proceeds of litigation. Here the bargain was for a share of the proceeds of the litigation in the Probate Court in the shape of a bonus, and as such was a breach of the law both as to champerty and maintenance.

1889. Jan. 14. KAY, J., in stating the facts of the case, pointed out that, although under clause 5 of their security, Messrs. *Kerr* had not actually bound themselves to make any advances for the costs of the probate litigation, yet the expectation that they would in fact make the advances, was held out in the deed as an inducement to the Plaintiff to give the bonus of £225, and that the evidence shewed that the Plaintiff so understood the deed. His Lordship then, having observed that there was some risk about the loan, that it was known that the Plaintiff could give no other security, and that *Jones* appeared to have satisfied Messrs.

(1) 4th Ed. pp. 686, 687.

(2) 2 Vern. 589.

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Kerr that the Plaintiff was likely to succeed in the Probate action, proceeded:—

The facts of this case give rise to some very interesting legal questions. The Plaintiff, by the present action, seeks to redeem on payment of the £100 and interest, without the bonus. The grounds for this relief are—first, that the agreement is tainted with champerty; secondly, that the bonus, being a collateral advantage stipulated for by a mortgagee, is contrary to law; and thirdly, that the transaction was voidable as an undue advantage, obtained from the Plaintiff when under the pressure of distress, and in a position very analogous to that of an expectant heir.

From very early times it has been a grave offence against the law for any one to intermeddle in litigation in which he is not interested. To "take in hand," "bear up," or "uphold" a quarrel was the offence of maintenance, which Lord *Coke*, in *Coke* upon *Littleton* (1), divides into *manutenentia ruralis* and *curialis*. The latter, he says, "is called *curialis* because it is done *pendente placito* in the Courts of justice; and this was an offence at the common law, and is threefold. First, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or any other thing in plea or suit; and this is called *cambipartia*, champertie." The other two divisions of maintenance are, maintenance without champerty, and embracery, which are not at present material. From this definition it appears that although there may be maintenance without champerty, the legal offence of champerty cannot exist without maintenance. A like definition is given by Sir *W. Grant*, in *Stevens* v. *Bagwell* (2): "That species of maintenance, which is called champerty; viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it." So in *Hartley* v. *Russell* (3), Sir *John Leach* said (4): "There is here, therefore, no bargain, or colour of bargain, that *Hartley* shall maintain the suit instituted by *Russell* against *Collins* in consideration of sharing in the profits to be derived to *Russell* from the success of that suit, which is essential to constitute champerty." The last-mentioned and many subsequent cases have decided that an

(1) Page 368 b.
(2) 15 Ves. 139, 156.
(3) 2 S. & S. 244.
(4) Ibid. 252.

assignment *pendente lite* of the subject of the suit is not champerty or in any way illegal, even though the assignor gives the assign a power of attorney to sue in his name, and agrees that he will not impede, but will assist the assign. See also *Wood* v. *Griffith* (1); *Cockell* v. *Taylor* (2); and *Myers* v. *United Guarantee and Life Assurance Company* (3).

The Court has gone somewhat far in discovering maintenance or inferring it in transactions of this kind. For instance, an agreement to procure the necessary evidence to make out the plaintiff's title as heir, and that the persons so agreeing should have £4000, less the plaintiff's costs of litigation, for which security was to be given on the estate to be recovered, if the suit succeeded, was considered by *Fortescue*, Master of the Rolls, to be an artful attempt to evade the *Statutes of Champerty* (3 Edw. 1, c. 25; 28 Edw. 1, c. 11; 33 Edw. 1, st. 3; and 32 Hen. 8, c. 9), which equity would not enforce, leaving the Plaintiff to his remedy at law: *Powell* v. *Knowler* (4). And an agreement by navy agents, during the pendency of a suit in the Admiralty Court, to indemnify against the costs of the proceedings if prize money was not recovered, in consideration of one-fifth share of the moneys which might be recovered, was held to be a clear case of champerty: *Stevens* v. *Bagwell* (5). In *Strachan* v. *Brander* (6) a bond was given for £4000, conditioned for payment of £2000. £1000 was advanced for the purpose of providing for the costs of a pending litigation in which the obligor was claiming considerable property. A week after giving the bond a defeasance was executed of the same date as the bond, declaring that, if the obligor did not recover the estate or half of it, the bond was to be given up. It was held that the bond could only stand as a security for the £1000 and interest, the Lord Keeper *Henley* saying that it savoured of champerty. In *Wood* v. *Downes* (7) Lord *Eldon* approved this decision, and followed it by holding that a conveyance of the subject of a suit by the Plaintiff to his attorney for a price alleged to be inadequate was champerty.

(1) 1 Sw. 43, 56.
(2) 15 Beav. 103.
(3) 7 D. M. & G. 112.
(4) 2 Atk. 224.
(5) 15 Ves. 139.
(6) 1 Eden. 303.
(7) 18 Ves. 120, 127.

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Referring to the later authorities, a bargain to supply evidence in legal proceedings agreed to be instituted in consideration of one-fifth of the property to be recovered, though no money was to be advanced, and the parties so bargaining were not to employ the attorney, was held by Lord *Campbell* to be maintenance in its worst aspect: *Sprye* v. *Porter* (1); and this was approved and followed in *Hutley* v. *Hutley* (2), and in *Bradlaugh* v. *Newdegate* (3). In the last-mentioned case it is said that the fullest and completest definition is given thus in Termes de la Ley: "Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance." These decisions and definitions are consistent with the language of the statute 28 Edw. 1, c. 11, which is thus translated in vol. i. p. 106 of the Revised Statutes: "The king will, that no officer nor any other, for to have part of the thing in plea, shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another."

The question, then, is, Did Messrs. *Kerr* by this deed "take upon them the business that is in suit?" Did they "bear up" or "uphold" the contest"? In the first place, after reciting the pendency of the suit, they stipulate that *James* shall employ *Bridgford* as his solicitor therein, and no one else without their consent. This would practically give to *Bridgford* and *Jones*, and to Messrs. *Kerr* through them, complete command of the defence in the Probate action; and, so far as the Messrs. *Kerr* were concerned, the only object of this was better to secure their share of the property to be gained, or, what amounts to the same thing, the advance and contingent bonus charged upon it. This seems to me to be essentially an act of maintenance. It is indicated as such by Lord *Campbell*, in *Sprye* v. *Porter*, as I have pointed out.

Again, the deed clearly holds out an expectation of the advance of money by Messrs. *Kerr* for costs of *James* in the

(1) 7 E. & B. 58, 81. (2) Law Rep. 8 Q. B. 112.
(3) 11 Q. B. D. 1, 5.

litigation, and this "savours" of maintenance, if it be not actual maintenance. If no such advance was to be made, a bonus of £225 was an exorbitant sum for the loan of £100, for which 5 per cent. interest was to be paid in addition. The expectation of such advances was, on the face of the deed, one of the motives for giving the bonus. If this be not champerty, it savours of champerty too much for a Court of Equity to allow the bonus to be recovered.

The second question raised upon this transaction is also of very considerable interest—whether the stipulation in this agreement for something beyond principal, interest, and costs—namely, the bonus of £225—is not invalid according to the law of mortgage securities as administered by Courts of Equity. It was established in former times, to use the language of the Master of the Rolls in *Jennings* v. *Ward* (1), that "a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." See also *Bowen* v. *Edwards* (2), *Croft* v. *Powel* (3), and *French* v. *Baron* (4). In *Broad* v. *Selfe* (5), Lord *Romilly* decided that this rule was not affected by the repeal of the usury laws, and he disallowed a commission for which the mortgagee had stipulated in addition to his principal and interest. Whether this rule is affected by the repeal of the usury laws or not, every one must agree with the language of Vice-Chancellor *Stuart* in *Barrett* v. *Hartley* (6):—"It is an observation of some importance now that the usury laws are repealed, that one effect of such repeal was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of this Court which existed long before them—I mean that principle of the Court which prevented any oppressive bargain, or any advantage exacted from a man under grievous necessity and want of money, from prevailing against him. Whoever has attended to the subject must have seen that the moment the usury laws were repealed, and the lender of money became entitled to exact anything he pleased in the name of interest, from that moment that jurisdiction of the Court

(1) 2 Vern. 520.
(2) 1 Rep. in Ch. 221.
(3) 2 Comyns, 603.
(4) 2 Atk. 120.
(5) 11 W. R. 1036.
(6) Law Rep. 2 Eq. 789, 795.

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which prevailed independently of the usury laws was likely to be called into active operation." The existence of this rule of equity unimpaired by the repeal of the laws against usury was emphatically affirmed by Lord Justice *Turner* in *Croft* v. *Graham* (1), and by Lord *Selborne* in *Earl of Aylesford* v. *Morris* (2).

I believe, with Lord *Romilly*, that the rule that a mortgagee should not be allowed to stipulate for any collateral advantage beyond his principal and interest did not depend on the laws against usury. The rule was entirely independent of the rate of interest actually charged. There seems to be less reason than ever for altering it now that persons may agree upon any rate of interest they please. Considering how completely the mortgagor is in the power of the mortgagee, and the great facilities which Courts of Equity have always given for recovery of the loan and realisation of the security, I think it is important to preserve the simplicity of the mortgage contract, and not to "clog the redemption" by stipulations of this kind. It seems to me inexpedient, and I should regret that the old rule should be altered. The agreement for the bonus of £225 in this case is, I think, invalid for this reason.

There remains, if these reasons were insufficient, the ground for relief in equity arising from the position of poverty and necessity in which the Plaintiff was, which put him practically at the mercy of the lenders, whatever terms they chose to exact. I exonerate Messrs. *Kerr* from any intention to defraud the Plaintiff. I believe they thought they were doing him a service upon terms which, considering the risk, were not unfair; but the transaction is one of which a Court of Equity cannot approve. The parties were not by any means "on equal terms," as Sir *J. Leach* said in *Wood* v. *Abrey* (3), and though *Jones* was acting in the transaction on the Plaintiff's behalf, it is plain that he was entirely influenced by the desire of obtaining complete command of the litigation, having a well-founded expectation, which he imparted to the Messrs. *Kerr*, of the ultimate success of the Defendants in the Probate action.

(1) 2 D. J. & S. 155, 161. (2) Law Rep. 8 Ch. 484.
(3) 3 Madd. 417.

I disallow the bonus of £225, and declare that the deed of June the 10th, 1884, must stand as a security only for the £100 actually advanced and interest at 5 per cent. The Plaintiff and the Defendants, the Messrs. *Kerr*, must have no costs of the action up to and including the hearing. There must be the usual redemption decree against the Messrs. *Kerr*, and also against the Defendant, *Hartland*, who is sued as a mortgagee of the Plaintiff.

Solicitors: *Mear & Fowler; Ridsdale & Son; F. S. Randolph.*

G. I. F. C.

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[1887 F. 424.]

Husband and Wife—Separate Property of Wife—Gift by Wife to Husband—Capital—Income—Evidence.

A married woman being entitled to a sum of money for her separate use under the will of a testatrix, a mortgage for a larger sum held in trust for the testatrix was transferred in the year 1867 by the married woman and another person, as executors of the trustee, to the husband of the married woman, he paying out of his own money to the executor of the testatrix the amount of the difference between the two sums. In 1869 the husband as mortgagee sold the mortgaged property, and his wife and the other executor of the original mortgagee, as such executors, concurred in the assignment to the purchaser, the execution of the assignment by the wife being procured by the husband. The husband received the purchase-money and applied it to his own use. The husband and wife lived together in amity until his death, and no proceedings were ever taken against him by her in respect of her money so received, nor did she receive any income thereof. There was no issue of the marriage. The husband died in 1885, having by his will, made in 1860, given his wife a life interest in his property. After his death she claimed to rank as a creditor against his estate for the sum received by him in 1867 with subsequent interest. She denied that she ever gave him any authority to receive the money, and there was some evidence that she objected to his receiving it. In the transactions in reference to the mortgage she did not appear to have had any separate advice:—

Held, that those who claimed under the husband had not discharged the burden which lay upon them of proving a gift of the capital sum by the

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wife to the husband, and that her claim in respect thereof must be allowed; but

Held, that as to the interest accruing during the life of the husband the claim must be disallowed.

THIS was an originating summons, originally taken out by Mrs. *Flamank* (since deceased), the widow of the testator, *Thomas Flamank*, as Plaintiff, asking, amongst other things, for a declaration whether or not she was entitled to rank as creditor against the estate of *Thomas Flamank* for the sum of £406 13*s.* 7*d.*, being moneys received by him forming part of the moiety of the estate of *Mary Drew*, deceased, which had been bequeathed to the Plaintiff for her separate use, and for interest on such sum from the date when the same was appropriated by the testator.

Under the will and codicils of *Mary Drew*, who died in 1866, Mrs. *Flamank* became entitled, for her separate use, to one moiety of the residuary personal estate of the testatrix. The will and codicils were proved in October, 1866, by *William Flamank*, the brother of *Thomas Flamank*, as surviving executor.

The residuary estate of *Mary Drew* comprised a sum of £450 and interest secured by a mortgage of leasehold property. The mortgage was effected by a deed dated the 22nd of February, 1865, and made between *S. Sercombe* of the one part, and *Daniel Codner* of the other part, and purported to be made in favour of *Codner*, who, however, was in fact a trustee for the testatrix, *Mary Drew*. *Codner* predeceased *Mary Drew*, having appointed *H. T. Mudge* and Mrs. *Flamank* executor and executrix of his will, which they duly proved.

From the residuary account of *Mary Drew's* estate made out by *William Flamank* it appeared that the residuary personal estate of the testatrix available for distribution among the residuary legatees amounted to £813 7*s.* 2*d.*, so that the share of Mrs. *Flamank* was £406 13*s.* 7*d.*

By an indenture dated the 22nd of February, 1867, and made between *Sercombe* of the first part, *Mudge* and Mrs. *Flamank* of the second part, and *Thomas Flamank* of the third part, in consideration of £450 expressed to be paid by *Flamank* to *Mudge* and Mrs. *Flamank*, as executrix and executor of *Codner*, the receipt of which they acknowledged, the mortgage debt of £450

was transferred, and the mortgaged premises were assigned by *Sercombe, Mudge,* and Mrs. *Flamank* to *Flamank* absolutely. By another indenture of the same date the mortgaged premises were charged with the payment to *Flamank* of the further sum of £40. The £450 was not in fact paid by *Flamank* to *Mudge* and Mrs. *Flamank,* and the £40 was in fact interest due under the mortgage.

On the 30th of April, 1867, *William Flamank* wrote to Mrs. *Flamank* as follows:—"My dear *Hannah,*—On the other side is a succinct statement of the affairs of your late aunt as laid before the office for payment of duties. . . . I shall require a cheque for the balance to be carried to the estate, and then hand over the securities to you for £490." On the other side was an account headed, "Mrs. *Flamank* in account with the executor of *Mary Drew,*" from which it appeared that Mrs. *Flamank* had received from the executor the sum of £516 17*s.* 7*d.*, in which were included the following items: "To *Sercombe's* mortgage transferred to you, £450"; "to further charge for interest due on the mortgage, £40": "to interest up to this April, £1 10*s.*"

On the 14th of June, 1867, *William Flamank* wrote to *Thomas Flamank* as follows:—"As you are going away you must please sign the release, and also *Hannah.* Give my boy a cheque for the amount, fixing *Hannah's* share at £406 13*s.* 7*d.*; therefore your cheque had better be for the balance as I gave you. I fill it for the exact amount in pounds, shillings, and pence. . . . Please tell *Hannah* after her return I will bring down the papers and vouchers and go through the same with her. You have the statement I sent *Hannah,* and which I fancied amounted to £515 9*s.* 2*d.*, but this I am speaking for rough guess. Please make the cheque payable to my order so that I can indorse it, and the boy has the deeds to give up to *Hannah,* for which please ask her to sign the inclosed receipt." Indorsed on this letter was the following memorandum in the handwriting of *Thomas Flamank*:—

"£515 9 0
£406 13 7
108 15 5

"Paid by cheque of mine to balance the account.—*T. F.*"

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The mortgage of the 22nd of February, 1865, the transfer of the 22nd of February, 1867, and other deeds relating to the mortgaged premises, were handed over to Mrs. *Flamank* (and presumably by her to her husband), and a receipt for them, dated the 14th of June, 1867, was signed by her.

By an indenture dated the 17th of June, 1867, Mrs. *Flamank* and her husband and the persons interested in the other moiety of the residuary personal estate of *Mary Drew* executed a formal release to *William Flamank* as executor of *Mary Drew*, and by a formal account, which was scheduled to the deed, credit was taken for £406 13*s.* 7*d.* cash paid to Mrs. *Flamank;* but no such sum of cash was in fact paid, the transfer of the mortgage to *Thomas Flamank* being apparently treated as equivalent to payment thereof.

In January, 1869, *Thomas Flamank*, as mortgagee and in exercise of a power of sale contained in the mortgage, sold the mortgaged premises to *G. G. Johnston* for £575, and by an indenture dated in that year and made between *Thomas Flamank* of the first part, *Mudge*, *Thomas Flamank*, and Mrs. *Flamank* of the second part, *Sercombe* of the third part, and *Johnston* of the fourth part, in consideration of the sum of £575 to *Thomas Flamank*, with the consent and direction as well of the parties thereto of the second part as of *Sercombe*, paid by *Johnston*, the parties thereto of the first and second parts, in pursuance and exercise of all trusts, powers, and authorities vested in or in anywise enabling them, assigned, and *Sercombe* assigned and confirmed the mortgaged premises to *Johnston*. *Mudge*, and Mrs. *Flamank* concurred in this deed in the characters of executor and executrix of *Codner*.

There was a meeting at which all parties except Mrs. *Flamank* executed this deed. *Thomas Flamank* then took the deed away, saying that he would procure the execution of it by her, and it was subsequently executed by her.

The purchase-money was received by *Thomas Flamank* and applied by him to his own use.

Thomas Flamank and Mrs. *Flamank* lived together on terms of amity as husband and wife, and no proceedings were taken by Mrs. *Flamank* against her husband in respect of the mortgage or

the mortgage money or the interest or income thereof, nor was any sum paid to her in respect of any such interest or income.

There was no issue of the marriage of Mr. and Mrs. *Flamank*.

Thomas Flamank died on the 22nd of December, 1885, having made his will, dated in 1860, whereby he gave the whole of his property to Mrs. *Flamank* for life, and after her decease, in the event of their having no issue, gave his residuary estate to the Defendants, *Mary Cock* (formerly *Mary Flamank*, spinster) and *Gwendoline J. Flamank*.

Administration with the will annexed was granted to Mrs. *Flamank*, and on the 16th of March, 1887, she took out the present summons. In support of the summons she made an affidavit, whereby she deposed that she often asked her late husband for information with regard to what he was doing concerning her affairs, but he never gave her any information; that the solicitor who acted with reference to the administration of the estate of *Mary Drew* was *William Flamank*; that he never explained to her, nor did she ever understand that any documents which she signed with reference to her share of the estate of *Mary Drew* would have the effect of vesting such share, or any part thereof, in her husband, so as to deprive her of the sum of £406 13*s.* 7*d.*, and that that sum was received and appropriated by her husband without any authority from her.

There was evidence shewing that Mrs. *Flamank* from time to time complained of the way in which her husband dealt with her property, and of his withholding information as to the disposal of it, and that these complaints occasionally led to disputes between them.

Mrs. *Flamank* died on the 7th of June, 1887, having by her will appointed *William Wood* and *Mudge* her executors, by whom the present proceedings were continued as Plaintiffs. After her death administration *de bonis non* with the will of *Thomas Flamank* annexed was granted to the Defendants.

Marten, Q.C., and *Dibdin*, for the Plaintiffs, the executors of Mrs. *Flamank*, submitted that *Thomas Flamank* was a trustee of the money in question for his wife; that the burden lay upon those who claimed under him to shew that there had been a gift

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by his wife to him, and that upon the evidence this burden had not been discharged.

Geare, for the Defendants, the administratrixes *de bonis non* of *Thomas Flamank*:—

The evidence is sufficient to shew that there was a gift by Mrs. *Flamank* of this sum of £406 13*s.* 7*d.* to her husband. Having regard to the lapse of time and the course of dealing, which was somewhat reluctantly acquiesced in by the wife for the sake of peace, the Court will infer a gift: *Caton* v. *Rideout* (1), where Lord *Cottenham* stated the rule to be that "separate money of the wife paid to the husband, with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled," and added that "the practice between the husband and wife is proper evidence to shew acquiescence and concurrence;" and see to the same effect *Edward* v. *Cheyne* (2). The sale of the mortgaged property by Mr. *Flamank* in 1869, the receipt of the purchase-money by him and application of it to his own use, the concurrence of Mrs. *Flamank* in the assignment to the purchaser, and the fact that there was no issue of the marriage, are strong circumstances in support of this conclusion. It must be inferred that the trust for the separate use of the wife was put an end to: *Gardner* v. *Gardner* (3). The case of *Re Curtis* (4) is distinguishable, because there the shares which had been transferred into the husband's name remained *in specie*; here there was a conversion of the property by the husband to his own use so long ago as the year 1869.

[KAY, J., referred to *Rich* v. *Cockell* (5).]

The cases which have decided that the mere transfer of the wife's separate property to the husband is not of itself evidence of a gift have proceeded upon the ground that there was no intervention of a trustee for the protection of the wife. Where that is the case, the Court requires very strong evidence of a gift. In this case there was the interposition of a trustee, namely, *Mudge*, who was co-executor with Mrs. *Flamank* under the will of

(1) 1 Mac. & G. 599, 603.
(2) 13 App. Cas. 385, 398.
(3) 1 Giff. 126.
(4) 52 L. T. (N.S.) 244.
(5) 9 Ves. 369.

Daniel Codner. For more than twenty years no claim was made by Mrs. *Flamank* for interest under the mortgage of 1865, and all right under the mortgage was therefore gone. This claim, not asserted until after the death of the husband, and after his will conferring benefits on the claimant had come into operation, ought to be disallowed.

Marten, in reply:—

The circumstance of the husband having made a will in favour of the wife does not affect the question: *Rowe* v. *Rowe* (1), where the will of the husband was made after the transaction, which would make the case in favour of a gift much stronger. In *Caton* v. *Rideout* (2) and *Edward* v. *Cheyne* (3) the question was as to income only, and not as to *corpus*. Upon the transfer to Mr. *Flamank* in 1867 he became trustee of the *corpus* for his wife: *Rich* v. *Cockell* (4); and there is no evidence that she ever acquiesced in the destruction of the trust. The circumstance that the husband converted the property to his own use is not conclusive: *Dixon* v. *Dixon* (5).

KAY, J.:—

This case is a very peculiar one, requiring careful investigation. On the 16th of March, 1887, Mrs. *Flamank*, who has since died, took out this summons, claiming certain sums against the estate of her deceased husband. That claim, as to the first part of it, in effect is that her husband obtained possession of a mortgage, being property to which she was entitled for her separate use, and that there is no sufficient evidence of a gift by her to him of the property to which she was so entitled, that is to say, of the mortgage debt. [His Lordship stated the facts of the case in reference to the will of *Mary Drew* and the mortgage for £450, and continued:—] On the 22nd of February, 1867, that mortgage was transferred to *Thomas Flamank*, the husband; and, of course, it is very important to see what that proceeding was. At that time, undoubtedly, the only title which *Thomas Flamank* could have was as husband of Mrs. *Flamank*, who was entitled

(1) 2 De G. & Sm. 294.
(2) 1 Mac. & G. 599.
(3) 13 App. Cas. 385.
(4) 9 Ves. 369.
(5) 9 Ch. D. 587.

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for her separate use to one half of the residuary estate of *Mary Drew*. [His Lordship referred to the residuary account and to the letters of the 30th of April, 1867, and the 14th of June, 1867, and continued:—] The transaction, therefore, seems to have been this. The amount made out as due to Mrs. *Flamank* was a net sum of £406 13*s.* 7*d.*, and the whole amount then due on the mortgage or previously received by Mrs. *Flamank* was £515 9*s.* and a cheque for £108 15*s.* 5*d.* was given by *Thomas Flamank* for the difference, the mortgage being handed over to him, and a receipt for the deeds was signed by Mrs. *Flamank*. [His Lordship referred to the terms of the receipt, and continued:—] Accordingly there was, and I assume with the knowledge of Mrs. *Flamank*, a transfer of the mortgage to her husband as her property, to which she was entitled for her separate use under the will and codicils of *Mary Drew*; but of course out of the mortgage debt the sum of £108 15*s.* 5*d.* paid by the husband belonged to him.

Now it is not disputed that the authorities shew that a mere transfer of that kind to the husband of a married woman is not of itself sufficient evidence of a gift to the husband of the separate estate of the married woman. And the reason for that is a very obvious one. The trustee of the will of *Mary Drew* had a right to say to Mrs. *Flamank*: "I am not going to hold this which is your absolute property, and I will transfer it to you, or, if you like, I will transfer it to your husband." If it is transferred to the husband such transfer is not made to him in his own right, but he is considered as trustee of the property for the wife. Then what happened afterwards was this. There was a release and a formal account on the 17th of June, 1867. The wife signed the release, and some time afterwards, in 1869, the husband, as mortgagee, sold this property, and there is no doubt that he received the purchase-money and applied it to his own use. The draft of the assignment to the purchaser is produced, in which Mrs. *Flamank* and *Mudge*, as parties of the second part, joined in the character of executors of *Daniel Codner*, to whom the original mortgage had been made. The evidence shews that there was a meeting at which all parties, except Mrs. *Flamank*, executed the deed. The deed was taken away by *Thomas Flamank*, who said that he

would procure her execution, and it seems it was afterwards executed by her. There is some evidence that the wife and husband now and then had some discussion concerning her property which he had in this way taken possession of, but she never took any proceedings to claim this property, nor did she receive personally any income or interest upon this mortgage during the rest of the life of her husband.

After the death of her husband Mrs. *Flamank* took out this summons claiming the £406 13*s.* 7*d.*, and the question is whether or not it did at that time belong to her as her separate estate. There is no question that originally the money did belong to her for her separate use, and undoubtedly she is right in saying that the burden of proving that it ever ceased so to belong is upon those who claim adversely under the husband. They are residuary legatees under his will, made before this transaction, by which he gave a life interest in all his property to Mrs. *Flamank*, and then in failure of issue of himself and her, which event happened, there was a gift over to these persons. Here is property which originally belonged to Mrs. *Flamank* for her separate use, and was transferred to her husband without any evidence whatever of there being an intention on her part to give it to her husband as his property at that time, and the question is whether, looking at all the facts, the Court can come to the conclusion that she did deliberately give it to her husband as his property. I cannot conclude that from the mere fact of the transfer of the mortgage to the husband. The circumstances which are relied upon are the realization of the mortgage by him in 1869, the concurrence of the wife, the receipt of the purchase-money by him, and the fact that no claim was made against him for it. But it is to be observed that the wife had no separate advice, and that her signature to the deed of assignment, in which she only joined as one of the executors of *Daniel Codner*, the original mortgagee, appears to have been obtained by the husband. I am quite unable to infer from all these facts that she made any gift of this money to her husband. The mere interception of the income by him is not sufficient to shew that. It has always been held, and *Caton* v. *Rideout* (1) is a leading authority, that while a husband and

(1) 1 Mac. & G. 599.

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wife are living together in perfect amity, as these were, the receipt by the husband of the separate income of the wife may be treated as a gift of that separate income to him to be applied for the joint benefit of himself and his wife, as for the maintenance of their household and the like, and in the present case it is quite plain there never could be any success in a claim to the income of this fund, although this summons goes so far as that, and seeks to claim income during the lifetime of the husband and wife. That part of the claim I at once refuse, but, thinking the burden of proof to be on those who claim under the husband to shew a gift of the capital, I must say, on a careful investigation of the case, that they have not made out any such gift, and, accordingly, I think this claim against the estate of the testator *Thomas Flamank* must succeed.

[His Lordship then dealt with other claims made by the summons which do not call for a report, and added that he did not allow any interest except from the death of the husband, because he treated all the other interest as having been applied for the joint benefit of the husband and wife.]

Solicitors: *Andrew, Wood & Co.; Geare, Son, & Pease*, for *Tozer, Geare, & Mathew, Exeter.*

C. C. M. D.

In re UNITED KINGDOM LAND AND BUILDING ASSOCIATION.

CHITTY, J.
1888
Dec. 19.

Winding-up—Official Liquidator—Employment of Solicitor—Taxation—Solicitors' Remuneration Act, 1881, *Gen. Order, August*, 1882, *r.* 6.

On receiving notice from the solicitor, whom he has employed to act for him in the winding-up, that he elects to be paid for his work under Schedule II., and not according to the scale charge under the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, it is the duty of the official liquidator, in order to discharge his duty of protecting the assets of the company, to obtain the direction of the Judge in Chambers as to whether he ought to continue to employ a solicitor who requires payment on the more expensive footing.

ADJOURNED SUMMONS for review of taxation.

The *United Kingdom Land and Building Association* was ordered to be wound up compulsorily on the 3rd of August, and on the 1st of September, 1887, *H. C. Sargent* was appointed official liquidator. The official liquidator, by memorandum in the usual form, appointed *Montagu Hawkins* as his solicitor in the matter, and on the 2nd of November, 1887, Mr. *Hawkins*, by writing under his hand, duly gave the official liquidator notice, pursuant to the General Order under the *Solicitors' Remuneration Act*, 1881, rule 6, that he elected that his remuneration for work done in connection with the sale, or offering for sale, of the leasehold property of the company should be under Schedule II. of the Order, and not by scale charge under Schedule I.

This notice was accepted and adopted by the official liquidator, in the belief that he had power to do so without reference to the Court; and also that, having regard to the circumstances of the case, and especially to the fact that the leasehold property of the company was situated at *Swindon*, and was subject to various incumbrances of a complicated nature, the notice was fair an reasonable

An order was obtained for the sale of a portion of the property, and on the 14th of December, 1887, a sale was effected.

The Taxing Master having taxed Mr. *Hawkins'* bill of costs in respect of this sale on the scale charge in accordance with

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Schedule I., which reduced the amount of the bill as calculated upon Schedule II., the objection to the taxation was taken by the official liquidator that the solicitor had given notice of his election to be remunerated according to Schedule II.

In answer to this objection the Taxing Master replied that the official liquidator was an officer of the Court, and that in sales under the direction of the Court the Court (through the Chief Clerk) fixed the amount of remuneration, and that the solicitor should have applied to the Court for leave to give such notice, if he desired to take his remuneration out of the fixed scale, and that he could not make the higher charge without such permission. Further, that it was the duty of the official liquidator to protect the creditors, and get the business done as inexpensively as possible; that other competent solicitors would have undertaken the work for the scale fee, and that the official liquidator ought not voluntarily to increase the expenses of sale by submitting to the notice, without first ascertaining that other solicitors would not accept the scale charge.

The matter now came on by adjournment from Chambers upon two summonses by the official liquidator: (1.) for the allowance of the objections to the taxation, and for a reference back to the Taxing Master to vary his certificate accordingly; and, (2.) that the acceptance and adoption by the liquidator of the solicitor's notice of the 2nd of November, 1887, might be confirmed.

Romer, Q.C., and *W. M. Cann*, in support of the summonses:—

The official liquidator is not supposed to come to the Court for instructions how to act as soon as he receives a notice from his solicitor that he elects to be paid on the old system (Schedule II.) for work done in the liquidation. The solicitor is clearly entitled to elect under which system he will be paid, and this is a matter of which the official liquidator was not ignorant, while he also knew that the solicitor whom he had retained had special knowledge with reference to the leasehold properties to be realised, which made it worth while to employ him on his own terms. Having acted in perfect good faith the official liquidator ought to be allowed to fulfil his agreement as to the remuneration of his solicitor. We submit, therefore, that the Taxing

Master has proceeded on a wrong principle, and that the objections to the taxation ought to be allowed.

CHITTY, J. :—

This is an application by the official liquidator, who is bound to protect the estate, for a review of the Taxing Master's certificate on the ground that the Taxing Master has allowed scale charges only to the official liquidator's solicitor, whereas, it is contended, the taxation ought to proceed on the non-scale charge, which, it appears, would give the solicitor a higher remuneration than the scale charge.

Consequently, the official liquidator, who is bound, as I have said, to protect the estate, comes here to ask that the estate may pay more than the Taxing Master has allowed.

Of course, it is obvious that this is the solicitor's application in the name of the official liquidator. On the day after the formal appointment by the official liquidator of the solicitor to act for him, the solicitor gave notice that he elected that the remuneration for work done with regard to certain leaseholds should be under the non-scale charge. The question is, what ought the liquidator to do under those circumstances? It is his duty to protect the estate, again I have to say that, and he must therefore act as any prudent man would do; and any prudent man receiving such a notice would look into the matter, and inquire of the solicitor, who would be bound to give him advice on the subject, and explain what the meaning of such a notice was. And if the liquidator did not understand it he, of course, could easily come to understand it by applying to the Judge in Chambers.

But if he did understand it, and he found that the result would be that the solicitor would get a larger remuneration, it was *à fortiori* his duty to come and ask the Judge in Chambers what course he should take. Then the matter would have been looked into. I say this, not only upon the considerations that I have already mentioned, but because it is well known that the official liquidator and the solicitor work together, and there is a good deal of *finesse*—I do not say it is wrong at all—in these liquidations; either the liquidator finding the solicitor, or the solicitor finding the liquidator, and each in turn acting so as to give the other

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remuneration—I do not say it is other than fair and just remuneration—for his services. Now if the official liquidator had brought this matter before the Judge in Chambers it would have been looked into, and it would probably have been ascertained what the result has shewn, viz., that the amount of remuneration on the non-scale charge would be larger than the amount on the scale charge, and then at once it would be suggested to the official liquidator, who could only, it must be recollected, appoint his solicitor with the leave of the Judge in Chambers: If this solicitor will not do it, see if you cannot get some other respectable solicitor to do it on the scale charge, and then it will be known exactly how much or how little will have to be paid, and there will be no trouble in ascertaining what the amount of the charge is. At any rate the matter would be looked into, and I consider it was the duty of the official liquidator to get the assistance of the Judge in Chambers under these circumstances, but he did not do it.

The Taxing Master has taxed, quite rightly I think, upon the scale footing, because it is a taxation, not against the liquidator, who is not liable, but for the purpose of seeing how much the solicitor is to get out of the estate. I think the estate must be protected in the manner which the Taxing Master has thought right, by taxing the solicitor's bill so as to give him remuneration according to the scale. I have never yet known, and I shall be glad when I find, the case of a solicitor who has taken a scale charge coming to the Court and saying: "I find that in this particular matter the scale charge remunerates me to a larger amount than the estate should pay." Such a thing, of course, might happen, but I should like to see it. The real meaning of a notice of this kind is almost plain on the face of it, viz., "I am going to get more by being remunerated in that way than by being paid according to the scale fee." Now the solicitor acting in the name of the liquidator has two summonses; one to review, and the other that the liquidator may now be allowed to consent to the notice *nunc pro tunc*. The result is that I think the Taxing Master is right, and I decline to send the certificate back to him to be reviewed, and I do not allow the costs of this application out of the estate. Nothing, of course, that I have said interferes

with the right of the solicitor to give such a notice under the Rules of the *Solicitors' Remuneration Act*, 1881.

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Solicitor: *Montagu Hawkins.*

F. G. A. W.

In re MARSDEN'S ESTATE. WITHINGTON *v.* NEUMANN.

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Jan. 18.

[1885 M. 432]

Interest on Costs—Solicitors' Remuneration Act, 1881, *General Order*, *r.* 7—*Administration Action—Costs payable out of Fund*—1 & 2 *Vict. c.* 110, *ss.* 17, 18 [*Revised Ed. Statutes, vol. viii. p.* 372]—23 & 24 *Vict. c.* 127, *s.* 27 [*Revised Ed. Statutes, vol. xiii. p.* 881]—*Rules of Supreme Court*, 1883, *Order* XLI., *r.* 3; *Order* XLII., *r.* 16.

Where, in an administration action, costs have been directed to be taxed, and when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special direction, payable on the costs.

MOTION to discharge, or vary, a decision in Chambers refusing to make an order for payment of interest at 4 per cent. on two sums certified to be due to the Plaintiff for her costs in an administration action.

On the 26th of January, 1883, the action was commenced by *Ellen Withington*, a beneficiary, for administration of the estate of the testator, *Richard Marsden*, and by the judgment of the 7th of July, 1883, the usual inquiries were directed.

The order on further consideration, dated the 29th of July, 1885, directed taxation of the costs of the Plaintiff and of the Defendants (the trustees and executors) of the action, the costs of the Defendants to be taxed as between solicitor and client, and to include any charges and expenses properly incurred by them as executors and trustees of the will; the Defendants to be allowed one set of costs only, and the Taxing Master to certify to whom and in what proportion such last-mentioned costs were payable; and it was ordered that such costs when taxed be retained and paid by Defendants out of the testator's estate

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generally, with liberty to apply as to the sale of testator's leasehold estate and as to raising and paying subsequent costs.

On the 12th of April, 1886, an order was made in Chambers, on the application of Defendants for partition of the leasehold estate and appointment of new trustees, and for taxation of the costs of Plaintiff and of Defendants of that application and relating thereto and consequent thereon, and of the conveyances and indentures appointing new trustees to be made and executed under the order: "the costs of the Defendants to be taxed as between solicitor and client, and to include any costs, charges, and expenses properly incurred by them in the action, or in or about the execution of the trusts of the testator's will, not being costs in the action; such costs when taxed to be raised and paid in like manner and out of the same funds as the costs directed to be taxed and raised and paid by the order of the 29th of July, 1885." And, subject to the raising and payment of the costs, the order directed the transfer of the trust funds to the persons beneficially entitled. Under this order the Defendants had transferred some of the shares to the persons beneficially entitled.

By the Taxing Master's certificate of the 20th of December, 1886, the Plaintiff's costs under the first order were certified at £174 3*s.* 9*d.*, and by the certificate of the 27th of January, 1888, the Plaintiff's costs under the second order were certified at £168 0*s.* 2*d.*

On the 2nd of November, 1888, these costs were paid to Plaintiff's solicitors, and accepted by them without prejudice to their claim for interest from the dates of the certificates.

On the 7th of November, 1888, a summons was issued on behalf of the Plaintiff for payment of interest on the costs, but was dismissed by his Lordship in Chambers with costs, on the 10th of December, 1888.

Plaintiff now moved that the decision in Chambers might be discharged or varied, and that the Defendants be ordered to pay to Plaintiff or her solicitors interest at 4 per cent. from the 20th of December, 1886, on the sum of £174 3*s.* 9*d.* certified to be due to her for costs by the certificate of that date, and also interest from the 27th of January, 1888, on the sum of £168 0*s.* 2*d.*

certified to be due to the Plaintiff for costs by the certificate dated the 27th of January, 1888.

Macaskie, in support of the motion, tendered an affidavit by one of the Plaintiff's solicitors, sworn on the 30th of November, to the effect that he had attended on the second taxation, and complained to the Defendants' solicitors of the non-payment of the costs previously taxed, and stated that he should require interest thereon and on the costs then taxed if not promptly paid. The affidavit also called attention to the delay of the trustees in carrying out the orders and in winding up the estate, and set out a correspondence on the subject. It did not appear that this affidavit had been used in Chambers.

[CHITTY, J., after some discussion, declined to admit the affidavit.]

Macaskie:—By the General Order under the *Solicitors' Remuneration Act*, 1881, r. 7, a solicitor is entitled to interest at 4 per cent. on his costs from one month from demand from the client, which has been held to mean from the date of sending in the bill: *Blair* v. *Cordner* (1); and where, as in this case, the costs are payable out of a fund not presently available, such demand may be made on the trustees who represent the fund and hold it for the benefit of all the beneficiaries.

And if the solicitor, who is not a party to the action, has this right against the fund in the hands of the trustee, the client must have the same right, as otherwise the last clause of rule 7 would be useless; and, moreover, the beneficiaries are in the meantime receiving 4 per cent. on their shares in the fund. If rule 7 does not *per se* give the right, then I rely upon the general right to interest given by 1 & 2 Vict. c. 110, ss. 17, 18, under which interest at 4 per cent. is recoverable on costs which one party is ordered to pay to another; and if it be contended that this provision applies only to party and party costs, then, I submit, rule 7 was intended to supplement the provision so that interest should be payable in all cases not covered by ss. 17 and 18.

(1) 19 Q. B. D. 516.

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H. Warlters Horne, contrà :—

Interest is not recoverable on costs payable out of a fund: *Attorney-General* v. *Nethercote* (1); except there has been a special direction under 23 & 24 Vict. c. 127, s. 27, for payment of the amount of costs as taxed with interest at 4 per cent. from the date of the certificate.

Rule 7 of the General Order under the *Solicitors' Remuneration Act*, 1881, has no application to costs in an action, whether payable out of a fund or between party and party, but is limited to non-contentious business; the power to make General Orders for prescribing and regulating the remuneration of solicitors being expressly limited by sect. 2 of the Act to business connected with sales, &c., and other matters of conveyancing, and "other business not being business in any action, or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business."

Blair v. *Cordner* (2) only decides that sending in a bill of costs is equivalent to "demand from the client" under rule 7. The application is, moreover, too late.

Macaskie, in reply :—

Sect. 2 and rule 7 includes the right to conveyancing costs which are incurred in an action: *Stanford* v. *Roberts* (3); and sect. 5, which provides that any General Order under the Act may authorize the allowance of interest, is perfectly general, and does not limit the power to interest in non-contentious business. But if it be held that rule 7 is limited, as contended by the other side, the Plaintiff ought to be allowed now to shew that a considerable portion of these costs were in respect of conveyancing business in connection with the appointment of new trustees.

CHITTY, J. :—

Since the matter was before me in Chambers the only evidence produced was the orders of the 29th of July, 1885, and the 12th of April, 1886. It was stated on behalf of the trustees that they had divided the funds according to the order; that statement

(1) 11 Sim. 529. (2) 19 Q. B. D. 516.
(3) 26 Ch. D. 155.

was accepted, and I decided, as my Chief Clerk had considered, that the application was too late. But, as a fact, there was an affidavit in existence which was not drawn to my attention. Nothing is adjourned to me unless it is ready for decision, as I will not have adjournments from time to time for fresh evidence. The affidavit was not tendered, and no leave has been given to alter the case made before my Chief Clerk, and read a new affidavit, and, indeed, it would require a very strong case to induce me to give such leave after the matter has been gone into before me. Consequently that affidavit cannot now be used.

Upon the main question I am of opinion that the solicitors have no right to interest. Under 1 & 2 Vict. c. 110, ss. 17, 18, costs carried interest not from the date of the judgment, but from the date of the Taxing Master's certificate. Then come the Rules under the *Judicature Act* of 1883, Order XLI., rule 3, and Order XLII., rule 16, the effect of which, combined with 1 & 2 Vict. c. 110, ss. 17, 18, in the case of an ordinary action where costs are ordered to be paid adversely, is to give solicitors the right to interest from the date of the judgment. But it is plain that the sections of the *Judgment Act* and the Orders have no reference to the payment of costs directed to be paid out of a fund. Without relying on *Attorney-General* v. *Nethercote* (1), decided in January, 1841, this has been the constant practice; and where the fund is in the hands of the Paymaster-General he is not at liberty to make any payment of interest unless there is a direction to that effect in the order. In that case the order is for taxation and payment of the costs by the trustees out of a particular fund, and there is no ground for saying that anything more than the amount of the taxed costs should be paid. If any interest was to be paid by the trustees the order ought to have directed it. In special circumstances such a direction might have been given, but the order is silent in that respect. Thus far, therefore, the solicitors are not entitled to interest. But then it is suggested that they are entitled to interest by reason of the *Solicitors' Remuneration Act*, 1881, General Order, rule 7. Now, on reading rule 7 I should say that it does not apply to such a case as this.

(1) 11 Sim. 529.

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The fund is in the hands of trustees who are directed by the order on further consideration to pay the taxed costs, and then to divide the fund. The rule shews that there must be demand and default, and if there has been a demand and default, and interest is payable out of the fund, the result would be that the beneficiaries who are entitled to the balance of the fund would be mulcted by the trustees, though if any persons are liable it would be the trustees, who are personally liable. A higher point has been taken, that the power to make orders under the Act of 1881 is limited to non-contentious business, and so that the rule does not apply to the costs in an action. But, then, without any evidence to that effect, it is suggested that some part of these costs are conveyancing costs. They are not costs in respect of conveyancing done within the scope and meaning of the Act; they have been taxed and paid, and I cannot listen to the ingenious suggestion which has been made, and send the matter back in order to ascertain whether some part of these costs were conveyancing costs or not, so as to allow interest upon items which may thus be picked out. Such a course would not be in accordance with the order of the Court directing execution of the trust and division of the fund after payment of the costs; and if there were any ground for the contention it should have been put forward at the time of making the order. And further, to refer the matter back to the Taxing Master now, would be keeping back the distribution of the fund. The result, therefore, is that there is no right to interest in this case. Whether interest on a portion of the costs might or might not be allowed is a matter of doubt, but it is now too late to raise the question and attempt to sever the costs.

The trustees have partially divided the fund, and if I order them to pay interest out of funds not divided, injustice would be done, because in that case the trustees would not be paying it out of the whole fund. The application fails therefore on principle.

Solicitors: *Nicholson & Graham,* for *Withington, Petty & Boutflower, Manchester; Pollock & Co.*

F. G. A. W.

GUY *v.* CHURCHILL.

CHITTY, J.

1888

Dec. 7, 18.

[1884. G. 1016.]

Champerty—Maintenance—Trustee in Bankruptcy—Assignment by Trustee of the Subject-matter of an Action—Assignee—Creditor—Right of Assignee to continue Action—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 50, *sub-s.* 5, *s.* 57, *sub-s.* 8, *s.* 168.

During the pendency of an action the Plaintiffs became bankrupt and *K.* was appointed trustee.

By deed dated the 10th of May, 1888, and made between *K.* (as such trustee in bankruptcy) of the one part, and *F.* (who was a creditor under the bankruptcy) of the other part, reciting that *K.* was not disposed to take on himself the risk and expense of continuing the action, the right of action was assigned upon the terms that *F.* should at his own expense continue the action free from control by *K.*, who was, so far as the rules and practice of the Court would permit, to give all assistance and information in his power to assist *F.* to carry on the action, and *F.* agreed to carry on the action at his own expense with diligence, and to use his best endeavours to bring it to a successful issue, with power to compromise, and the money, which might be recovered or might be received by way of compromise after deducting actual disbursements not paid by the Defendants (but not including *F.*'s solicitor and client costs), was to be divided into four parts, three to belong to *F.*, and one to *K.*

F. having obtained an order of course to carry on the proceedings in the action, the Defendants moved to discharge the order on the ground that the deed of the 10th of May, 1888, was champertous.

It appeared from the evidence that *F.* was acting as trustee for himself and other creditors under the bankruptcy, including the Plaintiffs' solicitors, who were also the solicitors of *F.*:—

Held, that the principle of the decision in *Seear* v. *Lawson* (1) applied, and that the fact that some of the creditors were to carry on the action at their own risk and expense, and to take a larger share of the fruits of the action than they otherwise would have done, did not bring the case within the law against champerty and maintenance, and that the transaction was one permitted by the bankruptcy laws.

The maintenance of the suit of another is lawful where the persons maintaining have an interest in the subject-matter of the action.

MOTION.

This action was brought by the Plaintiffs, Messrs. *Guy & Co.*, who were timber merchants, against the Defendants, who were their agents for the sale of timber, and the object of the action

(1) 15 Ch. D. 426.

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was to open accounts and to recover the difference between two sales made by the Defendants. The Plaintiffs' case was that the first sale had been made to a debtor of the Defendants, and that the second sale had been made as for their debtor at a larger price, and that in the circumstances the Plaintiffs were entitled to recover the difference.

The action was tried before Mr. Justice *Stirling*, who dismissed it, refusing leave to amend, but on appeal leave was given to amend.

The Plaintiffs were afterwards adjudicated bankrupts, and *Kemp* was appointed trustee under their bankruptcy.

By an indenture dated the 10th of May, 1888, and made between *Kemp* of the one part and *Ford* of the other part, after reciting the above-mentioned facts, and that *Kemp* as trustee in bankruptcy was not disposed to take upon himself the risk and expense of the re-trial of the said action, and had proposed to sell and dispose of such right of prosecuting the same, and all possible benefit to be derived therefrom, to the said *Ford* upon terms by which *Ford* should take upon himself, in exoneration of *Kemp*, and all the estate of the bankrupts, the further prosecution of the action, and should in manner thereinafter set forth covenant and agree to pay as a consideration for the assignment thereinafter made one-fourth full part or share of the net moneys (if any) to be recovered or received from the Defendants upon the re-trial or final settlement of the said action, and that such bargain and agreement had been approved of by the committee of inspection, it was witnessed that in pursuance of the said agreement, and in consideration of the covenant of *Ford* thereinafter contained, *Kemp* as such trustee as aforesaid thereby assigned to *Ford* all that the right of him *Kemp* as such trustee of the estate of *Guy & Co.* to bring, prosecute, and carry on against the Defendants the action then pending or any other action which he might be advised to bring with the same object and intent, that is to say, to enable *Ford* to recover and receive from the Defendants all and every and such sum or sums of money (if any) as the High Court of Justice should award, that the Plaintiffs but for their bankruptcy were entitled to, or that he, *Kemp*, as such trustee and their estate would be entitled to against the Defendants in

respect of the contract the subject of the action, or the liability of the Defendants to the Plaintiffs in respect of their acts or omissions in reference to the contract, together with all the rights, powers, privileges and authorities which *Kemp* as such trustee could give or confer, and was by law and equity entitled to transfer to *Ford* in connection with such right and remedy as aforesaid, to the intent that *Ford* should be enabled in his own name and at his own risk in all things in exoneration of the estate of the Plaintiffs and of *Kemp*, to bring and prosecute any such action as aforesaid, and to receive any such moneys as should be awarded as aforesaid, in as full and ample a manner in all respects as *Kemp* could or might do as such trustee as aforesaid, if personally acting therein, and free from all control or interference by *Kemp* as to the form or manner of carrying on such proceedings, and with absolute right and power at his own discretion to compromise and settle the action or any other action in reference to the same subject-matter upon such terms as he, *Ford*, should think fit, and *Kemp* covenanted with *Ford* so long as he should be trustee of the estate of the Plaintiffs, and so far as the rules and practice of the Court would permit, to give to *Ford* all such assistance and information as should be in his power as such trustee, and also, so far as he should have it in his power to procure *Ford* the assistance of the Plaintiffs' firm, he, *Ford*, bearing and paying all usual and proper charges therefor. And *Ford* covenanted with *Kemp* that he would with all diligence, but without being subject to the control or interference of *Kemp*, prosecute and carry on the pending action or other action as aforesaid against the Defendants, and use his best endeavours to bring the same to a successful issue, whether prosecuting the same to final judgment or otherwise, or compromising the same as he might think fit, and further, that if and when he, *Ford*, should under and by virtue of any such final judgment or compromise recover and receive from the Defendants any sum or sums of money in respect of the claim of the Plaintiffs in such action or proceeding, he, *Ford*, would forthwith pay over to *Kemp* as such trustee as aforesaid, or other the then trustee of the estate of the Plaintiffs, one-fourth part of the nett amount of such moneys after deducting and paying thereout all actual

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disbursements and charges not paid by the Defendants under any such judgment or compromise, but not including therein the untaxable cost or costs as between solicitor and client of the Plaintiffs in such action not recoverable from the Defendants, but including in case of compromise for a lump sum to include costs, all such costs &c. as under a judgment should be properly recoverable, and *Ford* covenanted to furnish a full and proper account to *Kemp*, as such trustee as aforesaid, shewing the nett amount so distributable, and at all times to render to him all reasonable information as to the progress of the said action or proceeding, and as to the conduct, management, and result thereof. And it was provided that nothing in the agreement should entitle *Ford* to use the name of *Kemp* in the action so as to render *Kemp* liable to any costs in relation thereto, but the said action and all proceedings in relation thereto should be continued in the name of *Ford* as assignee thereof.

It appeared from the evidence, and in fact was admitted at the bar, that *Ford* was himself a creditor in the bankruptcy, and was acting in the matter as a trustee for himself and other creditors, including Messrs. *Irvine & Hodges*, the solicitors on the record for the Plaintiffs, *Guy & Co.*, and who were also *Ford's* solicitors.

Ford having obtained an order as of course to carry on the proceedings in the action, this was a motion by the Defendants to discharge the order on the ground that the deed of the 10th of May, 1888, was champertous.

Romer, Q.C., and *Ingle Joyce*, for the motion:—

The deed is clearly champertous. The consideration for the assignment is part of the profit to arise out of the action if successful: *Stevens* v. *Bagwell* (1); *Anderson* v. *Radcliffe* (2); *Stanley* v. *Jones* (3); *De Hoghton* v. *Money* (4); *Hill* v. *Boyle* (5); *Hutley* v. *Hutley* (6); *Dickinson* v. *Burrell* (7).

In *Seear* v. *Lawson* (8), upon which case the other side will no doubt rely, the assignment was out and out, but here the trustee

(1) 15 Ves. 139.
(2) E. B. & E. 806.
(3) 7 Bing. 369.
(4) Law Rep. 2 Ch. 164.
(5) Law Rep. 4 Eq. 260.
(6) Ibid. 8 Q. B. 112.
(7) Ibid. 1 Eq. 337.
(8) 15 Ch. D. 426.

in bankruptcy retains an interest in the subject-matter of the dispute. Even assuming that the *Bankruptcy Act*, 1883, gives the trustee a right to dispose of the right of action, there is nothing in the Act authorizing him to retain an interest in the thing assigned, and we contend that the fact of the trustee in this case retaining such an interest invalidates the transaction.

Maidlow, and *Pyke*, for *Ford*:—

Ford is a creditor under the bankruptcy, and as such he is entitled to carry on the action for his own benefit and that of the other creditors: *Hunter* v. *Daniel* (1); *Findon* v. *Parker* (2).

Under the *Bankruptcy Act*, 1883, s. 57, sub-s. 8, the trustee may, with the permission of the committee of inspection, make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, and by sect. 168 "property" includes things in action.

Seear v. *Lawson* (3) is entirely in our favour. The fact of the trustee in bankruptcy retaining an interest in the subject-matter of the litigation can make no difference. We submit that the deed is a good deed and not void for champerty.

Romer, in reply, referred to *In re Attorneys and Solicitors Act*, 1870 (4); *Strange* v. *Brennan* (5); *Earle* v. *Hopwood* (6).

CHITTY, J.:—

Apart from the bankruptcy law and the relation of the parties, the deed of the 10th of May, 1888, is plainly void for champerty. It recites that the assignor was not disposed to take upon himself the risk and expense of continuing the action. The right of action is then assigned on terms which may be shortly stated as follows. The assignee, *Ford*, is to continue the action at his own expense, free from control by the assignor. The assignor, so far as the rules and practice of the Court will permit, is to give all assistance and information in his power to assist *Ford* to carry on

(1) 4 Hare, 420.
(2) 11 M. & W. 675.
(3) 15 Ch. D. 426.
(4) 1 Ch. D. 573.
(5) 15 L. J. (Ch.) 389.
(6) 9 C. B. (N.S.) 566.

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the action, but at *Ford's* expense. *Ford* agrees to carry on the action at his own expense with diligence, and to use his best endeavours to bring it to a successful issue, but has power to compromise. The money which may be recovered or may be received on a compromise, after deducting actual disbursements not paid by the Defendants (but not including *Ford's* solicitor and client costs), is to be divided into four parts, of which three are to belong to *Ford*, and one to the assignor.

The relation of the parties to the deed is this. The assignor *Kemp* is the trustee in bankruptcy of Messrs. *Guy & Co.*, and *Ford* is a creditor in the bankruptcy. The other material circumstances are as follows. Messrs. *Guy & Co.*, timber merchants, brought the action against the Defendants, who were their agents to sell timber. The object of the action is to open accounts and to recover the difference between two sales made by the Defendants. Messrs. *Guy & Co.'s* case was that the first sale had been made to a debtor of the Defendants, and that the second sale had been made as for their debtor at a larger price, and that in the circumstances Messrs. *Guy & Co.* were entitled to recover the difference. The action was tried before Mr. Justice *Stirling*, who dismissed it, refusing leave to amend; but on appeal leave to amend was given. Messrs. *Guy & Co.* were afterwards adjudicated bankrupts, and *Kemp* was appointed trustee under their bankruptcy.

Although on the face of the deed *Ford* appears to be taking the assignment for his own benefit, it is shewn by the evidence and the mutual admissions made by counsel at the bar that he was really acting as trustee for himself and other creditors, including Messrs. *Irvine & Hodges*, the solicitors on the record for the late Plaintiffs, Messrs. *Guy & Co.*

In the event, therefore, of the action being successful, these creditors will, in addition to their dividend in the one fourth which is to go to the trustee in bankruptcy, take a share in the three-fourths which are to go to *Ford*.

Two points are clear, and the argument for the motion proceeded on the admission of counsel that they were indisputable. The first is, that the right to continue the action passed to *Kemp* as trustee in bankruptcy. The second is, that *Kemp* was entitled

to sell this right even to a stranger. Both points are covered by the decision of the Court of Appeal in *Seear* v. *Lawson* (1). There the bankrupt had executed a deed which purported to be an absolute conveyance, but which, as he claimed, ought to stand as a mortgage only. The trustee in bankruptcy sold and assigned to *Chatterton* (a stranger) all his right and interest in the property; and by virtue of this assignment *Chatterton* claimed to continue in his own name the action which had been commenced before the bankruptcy. The Court held that the right to continue the action passed to the trustee in bankruptcy, Sir *G. Jessel* observing that the statute had made an assignment of the right in spite of the law of maintenance. On this point it was assumed, though not decided, that the bankrupt himself could not have assigned the right of action. The decision was founded upon the definition in the *Bankruptcy Act* then under consideration of the term "property," which included things in action. The Act of 1883, which applies to the case before me, is similar in terms (2). In regard to the assignment to *Chatterton*, which was also attacked on the ground that it was void for maintenance, the Court proceeded on a similar assumption, but held that, having regard to the provisions in the *Bankruptcy Act*, and particularly to the provisions empowering the trustee, with the sanction of the committee of inspection, to make arrangements, the assignment was valid. The Act of 1883 contains provisions to the same effect (3).

It is clear, then, that the deed of 1888, which was made with the sanction of the committee of inspection, cannot be impeached merely on the ground of maintenance. Any objections on that ground are removed by the *Bankruptcy Act*, 1883, quite apart from any considerations based on the relation of the parties.

But it was urged that it is void for champerty. It was said that the statutory powers conferred on the trustees by sect. 57, sub-sect. 8, to sell a *chose in action*, and to "make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any

(1) 15 Ch. D. 426.

(2) 46 & 47 Vict. c. 52, s. 50, sub-s. 5, s. 168.

(3) Sect. 57, sub-s. 8.

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person or by the trustee on any person," empowered the trustee to make only a lawful sale or a lawful arrangement. But this is merely a repetition of the argument which was distinctly negatived in *Seear* v. *Lawson* (1). The argument, then, is far too wide to be sustained.

But it remains to be considered in its more limited form as confined to champerty. It is difficult to find any sufficient reason for saying that the statute which makes lawful an arrangement which, apart from its provisions, would be unlawful on the ground of maintenance, does not also make lawful an arrangement open to the objection of champerty. The policy of the statute appears to be to give power to the trustee, with the sanction of the committee, to make arrangements in reference to *choses in action* which are considered beneficial to the creditors. It would be a strange and inconsistent result to say that although the right of action may be sold out and out it cannot be disposed of on the terms that some part of the fruit of the action if successful shall come back to the bankrupt's estate for division among his creditors.

"Maintenance" and "champerty" are always treated together by the writers on the subject, both ancient and modern; such for instance as *Coke*, *Hawkins'* Pleas of the Crown, *Blackstone*, *Russell* on Crimes, *Stephen's* Digest of the Criminal Law, and *Pollock* on Contracts. Maintenance is called the genus of an offence of which champerty is a species. It will suffice to quote the definitions of champerty from *Russell* on Crimes (2). "Champerty is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." This definition, which is taken from *Blackstone*, was adopted by *Vaughan Williams*, J., in his judgment in *Radcliffe* v. *Anderson* (3). *Russell* continues: "It is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it." This passage is taken from the judgment of

(1) 15 Ch. D. 426.

(2) 5th Ed. vol. i., p. 356.

(3) E. B. & E. 825.

Tindal, C.J., in *Stanley* v. *Jones* (1). *Lush*, J., in *Hutley* v. *Hutley* (2), speaks of champerty as "the most odious form of maintenance."

I have cited sufficient authority to shew that champerty is but a form of maintenance, though it be maintenance aggravated by an agreement to have part of the thing in dispute. Both maintenance and champerty are founded on the same principle or policy of law, viz., the tendency of the transactions to prevent the course of justice. But adopting the principle of the decision in *Seear* v. *Lawson* (3), I do not think I am carrying it beyond its true limits in holding that it covers the case before me. It would be too fine a distinction to hold that the arrangement shewn by the deed of May, 1888, is void merely because the bankrupt's estate gets back part of any money that may be recovered in the action.

I will add only a few words on the circumstance that the assignee of the *chose in action* and his *cestuis que trust* are creditors under the bankruptcy. Maintenance, when spoken of in the books, means unlawful maintenance. But the maintenance of the suit of another is lawful where the persons maintaining have an interest in the thing in variance. For instance, where a *chose in action* is vested in a trustee the beneficiaries may, by providing a fund for the expenses of the action, and by other means not in themselves unlawful, assist in maintaining the suit. So also may commoners maintain the action or the defence where one of their body is suing or being sued in respect of the common right. Unquestionably the creditors under a bankruptcy, or the creditors or contributories under a liquidation, may lawfully maintain the action or defence of the trustee or liquidator in his action or defence for the common benefit. I know of at least one case in my Chambers where Sir *George Jessel* sanctioned an arrangement whereby an action which the trustee was not inclined to institute, was to be brought solely at the risk and expense and solely for the benefit of some only of the beneficiaries, being those only who desired that the action should be brought. He must, therefore, have considered that the

(1) 7 Bing. 377. (2) Law Rep. 8 Q. B. 114.
(3) 15 Ch. D. 426.

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interest of the beneficiaries for whom the action was to be brought was sufficient ground for displacing any objection, not merely of maintenance, but of champerty. The substance of the transaction impeached by this motion is that some of the creditors are to carry on the action at their own risk and expense and to take a larger share of the fruits of the action than they otherwise would have taken. These facts appear to me to take the case out of the law against maintenance and champerty, or, at all events, to form an additional reason for holding that the transaction or arrangement is permitted by the bankruptcy law.

The case of *Hutley* v. *Hutley* (1) forms no exception to what I have stated in reference to the parties having a common interest. The case was one of maintenance and champerty, and it was held that the existence of what was termed a collateral interest was not sufficient to justify the transaction. In that case there were two wills, and the plaintiff, believing himself interested under the first will, sought to enforce against the defendant, the heir and one of the next-of-kin, an agreement to assist the defendant in upsetting the second will on the terms of his giving the plaintiff an interest in the property which would pass to the defendant on an intestacy. The agreement was based on the assumption of the plaintiff having no interest, the first will being obviously treated as a nullity. I know of no case where the actual interest of the parties being sufficient to justify maintenance the transaction has been avoided merely because they agreed to divide the subject-matter of the litigation among themselves, or some of themselves, in a manner not in accordance with their actual title.

Solicitors: *Hollams, Son & Coward; Irvine & Hodges.*

(1) Law Rep. 8 Q. B. 112.

G. M.

DAY *v.* WOOLWICH EQUITABLE BUILDING SOCIETY.

NORTH,

1888

Nov. 14, 1

[1887 D. 1158.]

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 56—*Solicitor—Receipt.*

A solicitor producing a deed containing a receipt must, in order to discharge a person paying him, be acting for the person sought to be charged, and having the deed in his office is not equivalent to production of it.

THIS was the trial of an action brought by *Henry Day* and his wife to obtain the cancellation of an indenture of further charge made in favour of the Defendant Society to secure payment, by monthly instalments, of £100 purported to have been advanced by the Defendant Society to the Plaintiffs, on the ground that the deed had been signed and sealed as an escrow, and no consideration was received by the Plaintiffs.

The material facts as found by the Judge were: A loan was negotiated between the Plaintiffs and the society by their secretary on the terms that they should execute the deed in question, and £100 should be paid by the society to a Mr. *Sutherland* on behalf of the Plaintiffs. The deed was prepared by a Mr. *Richardson*, the society's solicitor. The Plaintiffs, by his request, called at his office on the 30th of September, 1886, and signed and sealed the deed. The money was not paid to them; the solicitor stated there was, as the fact was, a difficulty by reason of the financial year of the society terminating on that day. The solicitor also said that the £100 would be paid to Mr. *Sutherland*. On the following day, the 1st of October, 1886, the society's secretary, in the office of the society, handed a cheque payable to bearer for £99 7*s.*, being the amount of the proposed advance less 13*s.* costs retained by the society, to the clerk of their solicitor, who paid the cheque into the solicitor's own banking account. The deed was not at this time produced. It was afterwards found in the solicitor's office and came into the possession of the society. The solicitor absconded and the £99 7*s.* was lost. The Defendants alleged that their solicitor was acting as solicitor for the

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Plaintiffs. The Judge found that in fact he was not. The question in the action was, whether the Plaintiffs or the Defendant Society were to bear the loss.

Cozens-Hardy, Q.C., and *H. Greenwood*, for the Plaintiffs:—

It is suggested that the Defendant Society is protected by sect. 56 of the *Conveyancing Act*, 1881, which makes the production by a solicitor of a deed, containing a receipt in the body of it, a good discharge for money paid to such solicitor. In the first place the payment was not made to any solicitor, it was paid to a mere clerk, to whom the power to give a discharge could not be delegated: *In re Bellamy and Metropolitan Board of Works* (1).

In the next place there was in fact no production of the deed when the cheque was handed over. Again, *Richardson* was the solicitor of the society, he was not as matter of fact the solicitor of the Plaintiffs; the section does not mean that any solicitor producing the deed, however he got it, can give a good discharge, he must be the solicitor of the party sought to be affected by the receipt: *In re Flower and Metropolitan Board of Works* (2); *In re Bellamy and Metropolitan Board of Works.*

Napier Higgins, Q.C., and *C. E. E. Jenkins*, for the Defendant Society:—

What was decided in *In re Bellamy and Metropolitan Board of Works* was, that trustees could not delegate the right to receive the money. Sect. 56 of the Act did not apply to them. That case fully recognises that a solicitor, who can be delegated to receive the mortgage money, by production of the deed can give a receipt, so that even if *Richardson* was not, what the Defendants maintain he was, the solicitor and authorized agent of the Plaintiffs to receive the mortgage money, he had the deed, and by production of it could give a good discharge. There was no necessity for the physical production of the deed, it was sufficient that he had it in his office, to be used for the purpose of the society as soon as the money was paid; when the money was paid he held it for the society, in the same way as if it had been produced to them. Nor did it matter that the cheque was not

(1) 24 Ch. D. 387. (2) 27 Ch. D. 592.

handed into his own hands on the receipt by his clerk, certainly such receipt followed by payment into *Richardson's* account was equivalent to payment to *Richardson* himself.

NORTH, J. (after dealing with the evidence, continued):—

Then a point of law is raised, and it is said that by operation of the *Conveyancing Act*, 1881, the handing the cheque to the solicitor's clerk was a good payment to the mortgagors. That turns on sects. 54 and 56 of the Act. Sect. 54 (1) provides "a receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed." The 56th section (1) is "where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

It is said that Mr. and Mrs. *Day*, when they called at the solicitor's office and executed the deed, did something which brought the society within the benefit conferred by these sections, and relieved them from the necessity of seeing that there was any authority in *Richardson* or his clerk to receive the money from them. I do not find, in the first place, that any solicitor did produce the deed at all. It was prepared by the society's solicitor; he kept it. It was in his office for three weeks; it was there long after the money was received; when the money was paid it is clear from the evidence that it was never produced at all. What the section says is, "where a solicitor produces a deed." The argument is that, where a solicitor has a deed which he could produce, if it remains in his office it is sufficient. I do not so read the section. I think it must have effect in the way in which it is expressed. And further, the view I take of the section is, that the person producing the deed must be a solicitor

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acting for the party to whom the money is expressed to be paid. It is clear that in *In re Bellamy and Metropolitan Board of Works* (1) the opinion of all the learned Judges was that the effect of the production of the deed was to give a special authority; to put it shortly in the words of Mr. Justice *Kay* (2): "The only effect of it is that on a solicitor producing such a deed the purchaser may deal with him just as though he had a power of attorney from his clients enabling him to receive the money." Lord Justice *Cotton* says (3): "In my opinion the simple effect of that section is to make a deed in the form pointed out equivalent to a special authority given to the solicitor to receive the money." In my opinion that refers to a solicitor acting in some way for the party sought to be charged, and does not mean that where a mortgagor has no solicitor acting for him, the solicitor of the mortgagee can, by producing the deed to the mortgagee, give a discharge on the mortgagor's behalf. In my opinion there has been no production within the meaning of the section at all.

Solicitor for Plaintiffs: *E. C. Rawlings.*
Solicitor for Defendants: *Muskett.*

(1) 24 Ch. D. 387. (2) 24 Ch. D. 390.
(3) 24 Ch. D. 399.

D. P.

NORTH, J.
1889
Jan. 14.

In re JACKSON.
In re COTTRELL.
BOUGHTON-LEIGH *v.* BOUGHTON-LEIGH.

[1888 J. 225.]

Solicitor—Costs—Taxation more than Twelve Months after Payment of Bill—Application by Third Parties—Costs improperly paid to Solicitor out of Trust Estate, with Notice of Breach of Trust—Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 41 [*Revised Ed. Statutes, vol. ix., p.* 132].

The administratrix, with the will annexed, of a testatrix, who was also tenant for life under the will, employed a solicitor in relation to the administration of the estate, and, as was alleged, paid his bill of costs out of moneys forming part of the capital of the estate. More than twelve months after the payment of the bill some of the beneficiaries, as Plaintiffs, took out an originating summons against the administratrix, as Defendant. The summons was intituled in the matter of the estate of the testatrix, and also in the matter of the solicitor, and it was served on him, but he was not named as a Defendant. The summons asked for a reference of the bill to taxation, and that in taxing the costs the Master might certify what amount was properly chargeable against the capital of the trust estate, and what amount was properly payable by the Defendant personally, as tenant for life; and that, if it should appear that the bill was overpaid, the solicitor might be ordered to repay the amount certified to be overpaid to the Defendant.

It was suggested that the bill contained items which were not properly chargeable against the capital of the trust estate, and that the solicitor knew that he was being paid out of the capital of the trust estate, and had notice of the breach of trust at the time when he received payment:—

Held, that the lapse of more than twelve months since payment was a bar to its taxation.

Held, also, on the authority of *In re Spencer* (1), that, even if the solicitor had been made a Defendant to the summons, the relief asked against him could not have been obtained.

Whether any relief could have been obtained against him, *quære*.

THIS was an originating summons, intituled in the matter of *Henry Jackson*, a solicitor, and in the matter of the estate of *Elizabeth Orton Cottrell*, widow, deceased. The Plaintiffs were persons beneficially interested under the will of Mrs. *Cottrell*. The Defendant was the administratrix, with the will annexed, of the testatrix, and was also tenant for life under the will.

(1) 30 W. R. 296; 51 L. J. (Ch.) 271.

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The summons, dated the 18th of February, 1888, asked (1) that it might be referred to the Taxing Master to tax and settle the bill of fees, charges, and disbursements, amounting to £1193 12*s.* 3*d.*, delivered by *Jackson* to the Defendant, as administratrix, in respect of his professional charges in relation to the administration of the estate, and paid by the Defendant out of the capital of the trust estate; (2) that *Jackson* and the Defendant respectively might be directed to produce before the Master, upon oath, as he should direct, all books, papers, and writings in their custody or power respectively relating to the matters to be referred, or any of them; (3) that in taxing the said costs the Taxing Master might be directed to certify what amount was properly chargeable against the capital of the trust estate, and what amount was properly payable by the Defendant personally, as tenant for life under the will; (4) that, in case it should appear that the bill was overpaid, the Master might be directed to certify the amount overpaid, and that in such case *Jackson* might be ordered, within twenty-one days after service of the order and of the Master's certificate, to be made in pursuance thereof, to repay to the Defendant what should be certified to be the amount so overpaid by her; (5) that the Master might be at liberty to state any circumstances specially, at the request of either party, as he should think fit; (6) that *Jackson* might be ordered to deliver up to the Defendant, upon oath if required, all title deeds, papers, and other documents relating to the estate, or to the administration thereof by the Defendant.

The bill was paid on the 19th of July, 1886.

The summons was not intituled in the matter of the *Solicitors Act* of 1843. It was served on the Defendant and also on *Jackson*. *Jackson* attended on the hearing by the Chief Clerk in Chambers. The Chief Clerk was of opinion that *Staniar* v. *Evans* (1) applied, and was disposed to make the order asked for, but, at the request of *Jackson*, the summons was adjourned into Court.

Giffard, Q.C., and *Bardswell*, for the Plaintiffs.

Cozens-Hardy, Q.C., and *A. J. Matthews*, for *Jackson*, took the

(1) 34 Ch. D. 470.

preliminary objection that, more than twelve months having elapsed since the payment of the bill, it could not now be taxed: 6 & 7 Vict. c. 73, s. 41.

Gifford, Q.C., and *Bardswell*, for the Plaintiffs:—

The present application is not made under that Act, but under the general jurisdiction of the Court.

[NORTH, J.:—What right have third parties to tax a bill at all except under the Act?]

The Plaintiffs will suggest that trust moneys have been improperly paid to *Jackson*, with notice to him of the breach of trust, and in that case he can be made to refund as a party to the breach of trust, and the Court can exercise a summary jurisdiction over him as its officer, though he is not made a Defendant. There is jurisdiction over the Defendant, and the solicitor has been served with notice of the summons and is here. *Staniar* v. *Evans* (1) is an authority for the order which we ask. In that case solicitors who had received trust money as such, and had retained it in payment of costs due to them by the trustee for business done in relation to the trust, were, when the trustee had made a default which disentitled him to costs out of the estate, ordered to pay over the trust money which they had received, and the order was made on a motion by the *cestuis que trust* in an action to execute the trusts to which the solicitors were not parties.

[NORTH, J.:—There the solicitors practically waived the objection.]

[*Cozens-Hardy*, Q.C., referred to *In re Spencer* (2), in which case an action was brought by a *cestui que trust* against his trustees for administration, the solicitors of the trustees being joined as defendants. It was alleged that grossly exorbitant sums had been allowed by the trustees in their accounts as costs paid to the solicitors, and the plaintiff claimed to have an account taken of moneys come to the hands of the solicitors on account of the estate, and to have their bill of costs taxed. The Court of Appeal held that the action could not be maintained against the solici-

(1) 34 Ch. D. 470.
(2) 30 W. R. 296; 51 L. J. (Ch.) 271.

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tors, and that the plaintiff's proper remedy was by petition under the *Solicitors Act*, 1843, as a third party, for the taxation of the solicitors' bill.

NORTH, J.:—Could this point be raised against a trustee *de son tort* by an originating summons?]

The question raised affects the rights or interests of persons who claim to be legatees under the will, and it affects the administration of the estate: Order LV., r. 3 (*a*), (*g*).

Jackson applied in Chambers and argued the case without raising any objection of form. Such an objection ought to be taken at the earliest moment. A *cestui que trust* is entitled to follow the trust fund in the hands of a person who has received it with notice of a breach of trust. In *In re Spencer* (1) there was no allegation that trust money had been improperly paid to the knowledge of the person who had received it. That is the foundation of our case.

[NORTH, J.:—The report of the case shews that such an allegation was made.]

The judgments of the Court assume that it was not.

[NORTH, J.:—In the present case there is no such allegation; the summons is simply for the taxation of the bill.]

Barnes v. *Addy* (2) shews the remedy of a *cestui que trust* against a constructive trustee.

If necessary, we ask for leave to amend the summons by adding *Jackson* as a Defendant.

The *Solicitors Act* has not taken away any jurisdiction which the Court previously possessed: *Allen* v. *Jarvis* (3).

Joseph Tanner, for the Defendant.

Cozens-Hardy, Q.C., and *A. J. Matthews*, for *Jackson*, were not heard.

NORTH, J.:—

I think I have no jurisdiction to make any order against the solicitor. The Plaintiffs are *cestuis que trust* under the will; the

(1) 51 L. J. (Ch.) 271. (2) Law Rep. 9 Ch. 244.
(3) Law Rep. 4 Ch. 616.

sole Defendant is the administratrix, with the will annexed, who is also tenant for life. She employed *Jackson* as her solicitor. He is not a Defendant to the summons, but he has been served with it. The summons asks for taxation of his bill of costs delivered to the Defendant. The amount of the bill has been more than twelve months ago paid by her, or with her acquiescence retained by him out of trust moneys placed in his hands by her. The Plaintiffs were not liable to pay the bill to the solicitor; the costs were not incurred on their instructions; the bill was not delivered to them, and they were not asked to pay it. There is no privity between them and the solicitor. The suggestion made is, that the solicitor has received part of the trust estate, with notice that it was paid to him in breach of trust, and that he can be made liable to the Plaintiffs for what he has so received. But he is not a Defendant to the summons, and, after the decision of the Court of Appeal in *In re Spencer* (1), he could not successfully have been made a Defendant. The preliminary objection is taken on his behalf that, under sect. 41 of the *Solicitors Act*, the application to tax his bill is made too late. The answer given is, that the application is not made under the Act. But the application is made by third parties, and third parties have no right to tax a solicitor's bill except under the Act. The Plaintiffs may or may not have some right of action against the solicitor, but no such action has been brought by them. The application is simply to tax his bill, and in my opinion the Plaintiffs have no right to do this. It is said that the preliminary objection was not taken in Chambers. No order was made on the summons in Chambers, but, before the Chief Clerk had given any decision, the solicitor exercised his right of asking for an adjournment to the Judge. I cannot, therefore, hold that the objection has been taken too late, and I must dismiss the summons as against the solicitor.

Solicitors: *Letts Brothers; A. P. Jackson.*

(1) 51 L. J. (Ch.) 271.

W. L. C.

NORTH, J.
1889
Jan. 25, 28.

CATE *v.* DEVON AND EXETER CONSTITUTIONAL NEWSPAPER COMPANY.

[1889 C. 7.]

Copyright—Injunction—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 18, 19 [*Revised Ed. Statutes, vol. viii., p.* 1158.]—*Newspaper Libel and Registration Act*, 1881 (44 & 45 *Vict. c.* 60), *ss.* 9, 10.

The proprietor of a newspaper registered as a serial publication under the *Copyright Act*, 1842, can sue in respect of his copyright in matter published in his paper; though neither the name of the proprietor nor the title of the paper is registered under the *Newspaper Libel and Registration Act*, 1881.

An injunction was granted to three Plaintiffs, the proprietors of three several serial publications registered under the *Copyright Act*, to restrain the infringement of their joint copyright in matter printed in all three publications, though the pirated matter was copied not from either of the three publications but from a reproduction of the same matter issued in another form by the authority of one of the Plaintiffs without further registration under the *Copyright Act*.

THERE were three Plaintiffs to this action, *William Cate* (the proprietor of a weekly publication called the *Commercial Compendium*), the *Trade Auxiliary Company, Limited* (the proprietors of a publication called *Stubbs' Weekly Gazette*), and *R. Perry* (the proprietor of *Perry's Weekly Gazette*). The several publications of the Plaintiffs were of similar character; they were issued weekly to subscribers only. They contained lists of bankruptcies, bills of sale, and similar matter, a leader on some mercantile subject, and information likely to be useful to persons engaged in trade. They jointly employed and paid two persons to make the proper searches and prepare lists of bankruptcies and similar matters (including deeds of arrangement), and they printed identical lists of those matters arranged in order of counties. All the three publications were registered under the *Copyright Act*. The Defendants were the *Devon and Exeter Constitutional Newspaper Company, Limited*. They had published in three issues of their weekly newspaper, the *Devon and Exeter Daily Gazette*, the lists of deeds of arrangement for the county

of *Devon*, which appeared in the Plaintiffs' publications for three successive weeks.

The writ was indorsed with a claim for an injunction restraining the Defendants from publishing their newspaper called the *Devon and Exeter Daily Gazette* containing any lists of deeds of arrangement or other information copied from the lists of deeds of arrangement or other matter compiled by the Plaintiffs and published by them in the papers or periodicals known respectively as the *Commercial Compendium*, *Stubbs' Weekly Gazette*, and *Perry's Gazette*, or copied from any copies of such lists.

The Plaintiff, *William Cate*, printed a certain number of copies of his *Commercial Compendium*, with a different heading, which he supplied to the *London Association for Protection of Trade*, 16, *Berners Street*, for distribution among members of the association. The name *Commercial Compendium* was omitted in the copies supplied to that association, and in place of that title there was placed at the top of the first page the name *London Association for Protection of Trade*, with the *London* and county addresses of the association at *Exeter*, *Torquay*, and *Plymouth*, and the words "Commercial Private and Confidential List. This list is circulated and must be received and regarded as one of a strictly private and confidential nature, not to be lent, used, or exhibited, or any portion of its contents known to any person except the member to whom it is directed."

The Defendant company had copied the lists complained of from lists of the *London Association for the Protection of Trade*, which they had received as subscribing members.

Each of the Plaintiffs' publications had been registered as a serial publication under sect. 19 of the *Copyright Act*, 1842 (5 & 6 Vict. c. 45). Neither the titles of the publications nor the names of the proprietors had been registered under the *Newspaper Libel and Registration Act*, 1881.

The action was brought on on motion on the part of the Plaintiffs for an interim injunction till the trial. The motion was by consent treated as the trial.

Cozens-Hardy, Q.C., and *McKenna*, for the Plaintiffs:—

The Plaintiffs are joint owners of the copyright in the pirated

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matter. They have complied with all the provisions of the *Copyright Act*, and are therefore entitled to sue. If there were any difficulty in their being separately registered, that is got over by a recent decision of Mr. Justice *Chitty*, in a case in which the present Plaintiffs sued another person: *Trade Auxiliary Company* v. *Middlesborough and District Tradesmen's Protection Association* (1), where it was held that you can have separate registration by joint proprietors of copyright; in fact it is not the copyright that is registered, but the publication in which the subject-matter appears.

Napier Higgins, Q.C., and *Stock*, for the Defendants:—

It was considered by Vice-Chancellor *Malins*, in the case of *Cox* v. *Land and Water Journal Company* (2), that a newspaper was not within the *Copyright Act*, 1842. If that view is right, there can be no copyright in a newspaper at all. The Plaintiffs, therefore, cannot sue, for there is no personal equity against the Defendants. It must be admitted, however, that the decision of the Vice-Chancellor is inconsistent with the view of Sir *George Jessel* in *Walter* v. *Howe* (3).

The Plaintiffs' publications are newspapers within the meaning of the *Newspaper Libel and Registration Act*, 1881. Neither the names of the proprietors nor the titles of the publications have been registered, as they ought to have been, under that Act. The Plaintiffs will not be allowed to sue so long as the statutory obligation thrown on the printers and publishers is neglected.

If it could be said that the fact that the persons whose duty it is to register under the Act are not the proprietors would make any difference in another case, it is immaterial in this case, because the proprietors and publishers are the same persons.

The Defendants have issued such a small portion of the substance of the Plaintiffs' matter that they have neither injured the Plaintiffs nor done anything which the Court will interfere with.

The Defendants have not taken from any of the Plaintiffs' registered publications. What they have copied from is the

(1) *Ante*, p. 425.
(2) Law Rep. 9 Eq. 324.
(3) 17 Ch. D. 708.

publication of the *London Association for the Protection of Trade*. That publication is not registered, and cannot be sued upon. The Plaintiff *Cate* by allowing that publication to go forth to the world unregistered has induced the Defendants to think they might properly use the matter. The Plaintiffs other than *Cate* are improper parties, there has been nothing taken from their publications.

Cozens-Hardy, in reply, on the question whether the list of the *London Association for the Protection of Trade* ought to have been registered:—

The Defendants have taken matter in which the Plaintiffs have a joint copyright. All that the law requires to enable them to sue is that their publications containing that matter should be registered before action brought. It matters not where the offender has taken the matter he has used from.

1889. Jan. 28. NORTH, J. (after stating the facts, continued):—

In answer to the application for an injunction, the Defendants raise a great number of objections. The first is this: They say there is no copyright in a newspaper; and, therefore, the Plaintiffs have no right to sue. I think at the present day it is clear that there is copyright in a newspaper as a sheet of letter-press; and although there was a decision of Vice-Chancellor *Malins* on one occasion that there was no copyright in a newspaper, I think the decision of Sir *George Jessel* in *Walter* v. *Howe* (1) holding that there was, has been universally accepted from that time to this as being a correct exposition of the law on the subject.

I hold, therefore, that there is the copyright in these publications.

[His Lordship then overruled, on the facts before him, an objection as to date of the first publication of the *Commercial Compendium* being wrongly entered, and continued:—]

Then another point made is that the papers in question are not registered under the *Newspaper Libel and Registration Act* of the year 1881; and it is said that that is a fatal defect. That Act is intituled "An Act to amend the Law of Newspaper Libel,

(1) 17 Ch. D. 708.

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and to provide for the registration of newspaper proprietors." The 8th section provides that "a register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the Registrar." The 9th section provides: "It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office on or before the 31st of July, 1881, and thereafter annually in the month of July in every year, a return of the following particulars according to the Schedule A hereunto annexed; that is to say, (*a*) the title of a newspaper: (*b*) the names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence."

Then the next section provides that: "If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding £25, and also to be directed by a summary order to make a return within a specified time." Now it is admitted that these publications have not been registered under those sections; but I see nothing to warrant the legal proposition sought to be drawn from that, that because it has not been done the parties are not entitled to bring an action. As regards that, there is no section in this Act providing that until a newspaper has been registered there shall be no right of action in respect of it; and one would have expected to find a provision of that sort, if that was the meaning of the Legislature. In the *Copyright Act* that provision is clear and precise; and when it is omitted here, I can only come to the conclusion that it is omitted because it was not intended to be inserted. I think this is clear also from another thing. The Act itself prescribes the duty, no doubt; but it lays down precisely what the penalty is to be; and it says if during the period of a month the return has not been made, then a penalty is to be exacted. So that although during the month the return has not been made, there is not even a penalty; and, therefore, during that time no provision whatever is contained in the Act by way of punishment for non-registration. It would be a very strong

thing to say that I could interfere without any statutory authority for it, and that because the Act has not been complied with the person who otherwise must be taken to have a clear right to sue is to be deprived of that right.

Then there is another thing to be said about it: this Act contemplates that the printer and publisher of a newspaper, and the proprietors of a newspaper, are different persons. The name and address of the printer have to appear on every paper; and this Act now provides that the printer and publisher are to register the names of the proprietors. I find nothing whatever imposing any penalty upon the proprietors if their names are not registered; the penalty is only imposed on the printers and publishers, who are the only persons whose duty it is to register under the Act; and it would be impossible for me to say that the proprietors of a newspaper are to be deprived of the right to sue because another person, upon whom a duty is imposed, has not performed it. It is argued that in this case the printer and publisher and the proprietor are the same. I do not know how that is; it is suggested that it is so; it may be; but inasmuch as the Act deals with the two persons as different, I cannot treat them as one because the two positions of proprietor and printer and publisher happen to be combined in the same person.

Then another point raised is this: that at any rate the Plaintiffs other than Mr. *Cate* have no right to sue, because, if what has been done by the Defendants is a copying from the *Commercial Compendium*, there has been no copying whatever from the other papers. In my opinion the point is quite unimportant. In the first place, if it is well founded it is not material, because if there is one good Plaintiff here that is quite enough, and if the other two Plaintiffs have been improperly joined the fact is utterly unimportant, unless, of course, some extra costs have been caused by it, which I might have to deal with. But in the next place I do not think the proposition is sound, and for this reason. What is it that the Defendants have put in their paper? Part of matter in which each of the Plaintiffs has a copyright. It is true the Defendants copied it indirectly from the *Commercial Compendium*; but it does not matter where they got it from, whether it came from all these papers, or any one of them, or

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from some other proper or improper copy of the paper: they have taken that in which the three Plaintiffs have a copyright; and, under those circumstances, the three Plaintiffs are entitled to sue in respect of it. It is obvious that if there had only been one of them Plaintiff a difficulty might have arisen, which is avoided by all three being joined.

Then another point is one that has more in it, although I do not think it is sound. It is said that what is registered is the *Commercial Compendium*. The title is one of the things that has to be registered, and the object of that is said to be that persons may know it is a registered thing—that they may search the register and know in which documents there is copyright, so that they may refrain from publishing or copying from documents which are copyright, but may copy from others as to which they have not the means of knowing whether they are copyright or not. But it cannot be any justification for the Defendants if they have copied what they had no right to copy—it does not lie in their mouths to complain except in this way, (and that is, as I understand, the way in which this objection is put,) that it disqualifies the Plaintiffs from complaining of what they have done. I think that is founded upon a misapprehension of the *Copyright Act*. It is not intended that there should always be complete registration of the publication in which there is copyright in order that persons may know what they may legitimately copy, and what they cannot so copy. The Act itself contains provisions which make that clear. It is well known that registration is only necessary as a condition precedent to suing; and the almost universal practice on the part of large publishers notoriously is that they do not register until just on the eve of taking some proceeding: then they take care to register their copyright, and sue upon it. I think, therefore, that the contention that the Defendants have not been warned by registration of the title under which this document appears is not one which can be sustained. Further, it seems to me impossible for the Defendants here to say that they have been misled by the silence of the Plaintiffs on this subject into publishing what they have done; because when you look at the document which they have received, there is a direct warning at

the head of it that it is strictly private and confidential, and is not to be used for the purpose of publication. They, therefore, if they choose to publish it, cannot say that they have been misled into the belief that they would be justified in publishing the contents of that paper, because they have been expressly warned by the paper itself that they had not any such right.

Then there is a further point raised by the Defendants that the amount that has been taken from the copyright publication is very small. In one paper I think out of the three weeks papers which have been put in evidence there was only one entry taken; in another there were, I think, four; in the third only a small number; but in considering these it must be borne in mind that all that is material for the Defendants for the purpose of their newspaper has been taken, and that it is taken entirely —copied exactly from the paper—taken regularly, systematically, every week, and published for the purpose of giving information to the very persons to whom the Plaintiffs intend their publications to give that information; and, what is more important still, the Defendants now claim to do it as of right; and that of itself is quite sufficient to put them in the wrong in the action and get over any question as to the amount of matter actually taken from the particular publication which is in evidence. It seems to me, therefore, that the Defendants have been wrong throughout: they had no right to take this matter in which the Plaintiffs have copyright, and the action is well founded.

There is one point upon which no observation was made to me, and upon which I feel some little difficulty, namely as to the exact form of relief now to be given; because it is agreed that this is to be treated as the trial of the action, and it is clear that an injunction can only be granted in respect of matters with regard to which the Plaintiffs now have the copyright and a present right to sue; they cannot have any protection by injunction to restrain the Defendants from publishing hereafter any future entries with respect to which the Plaintiffs may possibly, before they are published, acquire a copyright by employing persons to make them, and paying those persons for doing it; but as to which they clearly cannot at this moment have any copyright.

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An injunction was granted limited to the matter common to the three numbers of the Defendants' newspaper to which the evidence related, and the three corresponding numbers of the Plaintiffs' several publications.

Solicitors for Plaintiffs: *McKenna & Co.*
Solicitors for Defendants: *Coode, Kingdon, & Cotton.*

D. P.

NORTH, J.
1889
Feb. 7.

In re SOLOMON AND MEAGHER'S CONTRACT.

[1888 S. 3763.]

Lord Cranworth's Act (23 & 24 *Vict. c.* 145), *ss.* 11, 15—*Equitable Mortgage by Deed—Power to sell and convey—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 71—*Repeal.*

An equitable mortgagee in fee, by deed made before 1882, by a mortgagor who has the legal estate, can, under *Lord Cranworth's Act*, ss. 11, 15, sell and convey the legal estate; and that notwithstanding sect. 71 of the *Conveyancing and Law of Property Act*, 1881.

BY deed of equitable mortgage dated the 19th of August, 1879, *James Dodd* subjected and charged a piece of land at *Peckham Rye*, of which he was seised in fee, with payment of £300 and interest in favour of *Lewis Solomon*, *Solomon Phillips*, and *Solomon Jewell*. The deed contained an agreement that when called upon the mortgagor would execute to the lenders a legal and proper mortgage, with power of sale, and all other powers, provisoes, and agreements usually contained or inserted in mortgages. On the 31st of July, 1888, the mortgagees contracted to sell the premises in exercise of the power of sale given them by *Lord Cranworth's Act*, sect. 11, to *Richard Meagher*. The purchaser accepted the title, but required the mortgagor to concur in conveying.

This was a vendors' summons under the *Vendor and Purchaser Act* to determine whether the vendors, who are equitable mortgagees by deed of freehold property, could make an effectual conveyance to the purchaser.

J. H. Bakewell, for the Vendors:—

In a simple case like this, where the mortgage comprises the whole interest in the estate, it is quite clear that the mortgagee can convey; it may be that where the mortgage does not include the whole interest of the mortgagor the mortgagee can only convey what is the subject-matter of the mortgage. In the case of *Hiatt* v. *Hillman* (1), where there was a mortgage by way of underlease, it was held that the interest left in the mortgagor not included in the mortgage being merely a nominal interest, a reversion for one day, the mortgagee could convey the superior lease. That case was commented on in the case of *In re Hodson and Howes' Contract* (2). It was not overruled. Unless the Act (sect. 15) operates in a case like this it can never have any operation.

Thomas Brett, for the Purchaser:—

The remarks both of your Lordship and the Lords Justices in *In re Hodson and Howes' Contract* shew that in the opinion of the Judges who decided that case it would be too dangerous to allow a mere equitable mortgagee to be empowered to convey the whole interest that was in his mortgagor when the mortgage was made; and the Court cannot say that the power exists in one case and not in another.

Lord Cranworth's Act is repealed by sect. 71, sub-sect. 1, of the *Conveyancing Act*, 1881. The saving clause, sect. 71, sub-sect. 2, only applies to matters done before the commencement of the Act.

NORTH, J.:—

I have to construe a section of an Act the meaning of which I think clear. The reason for making such an enactment is a matter I have nothing to do with. By the 11th section the statute provides that where any principal money is charged by deed on any hereditament of any tenure, or any interest therein, the mortgagee shall have, among other powers, a power of sale. Then the 15th section provides: "The person exercising the power of sale hereby conferred shall have power by deed to

(1) 19 W. R. 694. (2) 35 Ch. D. 668.

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convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of." This must have some meaning. It would not benefit the mortgagee to say that he had power to convey the equitable interest he already had power to convey: nor to say that he had not power to convey more than the estate and interest the mortgagor had power to dispose of. Then there are the following words: "except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed." Why is this distinction drawn between copyholds and hereditaments that are not copyhold? The distinction is that in the latter case something more than the beneficial interest may pass, while in the case of copyholds the beneficial interest only is to pass, by reason, no doubt, of the interest which the lord has. The present case is very simple. The mortgagor was the absolute owner in fee. He made an equitable mortgage of the whole fee; the only question is whether the mortgagees, who have exercised the power of sale given them by statute, can themselves convey the legal estate in fee. I do not see any difficulty or danger in a case of this sort in holding that the Act means what it says. I can see that there may be cases in which it would be very difficult or dangerous to put such a construction on the section. I can see that where there is a mortgage by an owner in fee for a term of thirty years there might be a question whether the mortgagee could sell the fee and put in his pocket the difference between the value of the fee and the term. There might be two equitable mortgagees, each having a power of sale, and each might have sold under his power and executed a conveyance. I need not now express an opinion as to where the legal estate would go in such an event: whether the one who first exercised the power could confer the legal estate, or whether the earlier mortgagee in point of date would have the power to convey the legal estate. I do not know what construction would be put on the statute in such a state of things. In the present case, there are simple words to which I must give some meaning. I do not see what I can do except decide that the equitable mortgagees can convey whatever estate was in the mortgagor at the date of

the mortgage. The case of *Hiatt* v. *Hillman* (1) seems to me entirely in point in this case. It does not get rid of the difficulties that may arise in more complicated cases. In that case it was held that an equitable mortgagee by deed of leaseholds by way of underlease could sell the lease. In the case of *In re Hodson and Howes' Contract* (2), before me, being a case under a different Act of Parliament, I thought it was not necessary to consider how far *Hiatt* v. *Hillman* ought to be followed, and the Court of Appeal took the same view.

Giving the best consideration I can to the matter, I think in a simple case of this sort I must hold there is power in the equitable mortgagees to convey the dry outstanding legal estate; as the interest of the mortgagor which he charged was in fee it is a question of a dry legal estate.

Another point taken by Mr. *Brett* is in respect of the *Conveyancing Act*, 1881. Section 71 repeals *Lord Cranworth's Act*, and it is said that the power of sale given by that Act is taken away by such repeal. But that section proceeds, "the repeal by this Act shall not affect any operation, effect, or consequence, of any instrument executed or made before the commencement of this Act." I cannot restrict the words "shall not affect any operation of any instrument made before the commencement of this Act" to an operation before the commencement of the *Conveyancing Act*. I hold, therefore, that the repeal in the *Conveyancing Act* does not take away the power to sell and convey under this instrument.

Solicitors for the Vendors: *Wynne, Holme & Wynne.*
Solicitors for the Purchaser: *Fishers & Reece.*

(1) 19 W. R. 694. (2) 35 Ch. D. 668.

D. P.

KEKEWICH, J.

1888

Dec. 1.

CONWAY *v.* FENTON.

[1888 C. 24.]

Repairs—Tenant for Life—Expenditure of Trust Money—Jurisdiction.

Land and money were vested in the trustees of a settlement for the benefit of the husband and wife for their lives, and after their deaths for their children. The buildings on a farm on the land were so much out of repair as to make the farm untenantable :—

Held, that the Court had power under its original jurisdiction to sanction the expenditure of part of the money in repairing the farm buildings.

By and under an indenture of settlement, and a subsequent indorsed memorandum, *Marian A. S. Conway* conveyed to trustees her share (being a moiety) of certain property comprising farms and lands in *Wales*, and stocks or money to the amount of about £5000, upon trusts for sale and for re-investment in stocks or shares or on mortgage as therein mentioned, and the trustees were to stand possessed of the investments upon certain trusts for the benefit of *Marian A. S. Conway* and *Harry S. Parsons*, afterwards her husband, for their lives, and after their deaths for their children. The indenture contained further powers of sale and investment, including a power to invest in the purchase of any messuages, lands, rents, or hereditaments in *England* and *Wales*.

By an indenture dated the 24th of August, 1887, *Mary E. S. Conway* conveyed one undivided moiety of the same farms and lands to trustees on trusts for sale, and to hold the money arising from such sale on the trusts declared by another indenture. By the other indenture, bearing the same date, and made on the marriage of *Mary E. S. Conway* to *A. E. Fenton* a sum of £5000 was covenanted to be paid to the trustees to be held by them on the trusts of the money to arise from the sale of the above-mentioned undivided moiety. The trusts were for the benefit of the husband and the wife during their lives, and after their deaths for the children of the marriage. The trustees had powers to invest in stocks, shares, or mortgages, but had not power to purchase real estate.

This was an application by the trustees of the two settlements

for liberty to lay out £800 in repairs and improvements on a farm forming a portion of the property comprised in the settlements. Part of the proposed buildings would be new; and there were affidavits that the farm could not be let or sold, and would deteriorate unless the repairs were done. The incomes of Mr. and Mrs. *Parsons* and of Mr. and Mrs. *Fenton* were each under £500 a year. There were children of one of the marriages.

The circumstances under which the application came before the Court are stated in the judgment.

Ryland, for the trustees:—

Such an outlay will be sanctioned when necessary for the preservation of the property. In some cases new buildings have been allowed under a power to purchase. But the Court has power under its general jurisdiction to allow such expenditure: *Frith* v. *Cameron* (1); *In re Jackson* (2); *In re Household* (3). The tenants for life cannot be expected and are not able to lay out so much money. It is in fact for the benefit of the remaindermen that the property should be kept in good order, and not be ruinous and useless when it comes to them. Unless the buildings are repaired the trustees would be unable to sell under their power.

W. Baker, for the tenants for life, supported the application.

Janion, for the infant children:—

It is very difficult to decide whether this plan will or will not be for the benefit of the infants. Independently of the possible advantage to the infants as remaindermen, the parents have little or no income out of which to maintain the infants except that which comes from the settled property. No doubt, it is unusual to give money to repair houses, but here the repairs will be a substantial addition to the property. *In re Leigh's Estate* (4), *In re Hotchkys* (5), and *Drake* v. *Trefusis* (6) are authorities for such an expenditure.

(1) Law Rep. 12 Eq. 169.
(2) 21 Ch. D. 786.
(3) 27 Ch. D. 553.
(4) Law Rep. 6 Ch. 887.
(5) 32 Ch. D. 408.
(6) Law Rep. 10 Ch. 364.

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KEKEWICH, J.:—

It is important, I think, to bear in mind precisely how this matter comes before the Court, and what is the question before the Court. A summons was issued in the *Manchester* district registry, and was heard before me in Chambers, of this character. The trustees of two settlements asked for the directions of the Court empowering them to lay out money in the repair of farm buildings. Each set of trustees have vested in them a moiety of the fee in the farms, and each set of trustees also hold personal estate of about the same value, £5000 and upwards, settled substantially in the same way as the undivided moieties of the farms. These trusts do not substantially differ from the usual trusts in such a case. There is a trust for sale of the real estate, and the proceeds of sale are to be held on the same trust as the £5000 in each case. Subject to the tenancies for life of the parents, the property goes ultimately in each case to the children. There are children in the one case, and there are no children in existence in the other; but I must contemplate the possibility of children taking in both cases. There was some evidence before me in Chambers that it was of importance, if not necessary, at once to repair these farm buildings—some evidence, if it could be relied on without supplement, going to shew that the farm buildings were in such a state of repair that it would be impossible to retain the tenants, or get new tenants, unless the buildings were pulled down and rebuilt, or at once put in a proper state of repair. But, thinking the evidence unsatisfactory, I was of opinion there yet was enough to enable me to consider whether I had any jurisdiction to make such an order as is asked, if the evidence eventually proved all that I was told could be proved if an opportunity were given. I therefore thought that I ought to determine the question of jurisdiction on the assumption that the evidence before me was to be relied on, and that it could be supplemented in the way that was stated; and in order to save expense, which might otherwise be thrown away if eventually I decided against my jurisdiction, I directed the case to be adjourned into Court, to be argued on that point; and it now comes before me in that way. I therefore assume, though it is not proved, that some repairs to these farm buildings are

absolutely necessary in the sense which I have already mentioned—that unless the farm buildings are repaired, the present tenant must quit; that the place is not habitable, and that no other tenant could be found at any rent, or, at any rate, at a fair rent.

The question I have to consider is whether, assuming for the present purpose that this is the case, I have any jurisdiction to make such an order. Mr. *Ryland* has called my attention to such parts as he thought right and necessary of the settlements, and has pointed out that one of the settlements contains a power to invest in real estate, and the other does not; and he has conceded, as practically he was bound to concede after the discussion in Chambers, that he cannot ask me to do what is wanted, under the investment clause.

No doubt there are many cases, not commencing with *In re Leigh's Estate* (1), but starting from that case as from a corner-stone, in which the Court has held that, where there is a power to purchase real estate, that power may be well exercised in the erection of buildings on a property already in settlement. That is really equivalent to a purchase of real estate. The limits of that doctrine were closely examined in *Drake* v. *Trefusis* (2), since which, so far as I am aware, there has been really no discussion in the profession on the point.

But that is not the ground on which I am asked to make the order. The ground on which I am asked to make the order is, that it is necessary for the preservation of the property that these repairs should be allowed; and it is urged that, if it is necessary for the preservation of the property, then I ought to sanction the expenditure out of the money which is settled in the same way.

The question is raised on an originating summons under Order LV., r. 3 (*e*). The object of that order was to enable trustees or persons beneficially interested under a settlement or will to come by summary mode to the Court, and to obtain the determination of any question, whether of administration, or of law, or of construction, without the necessity of what used to be known as an administration suit or action. I take it that, for all

(1) Law Rep. 6 Ch. 887. (2) Law Rep. 10 Ch. 364.

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purposes, or almost all purposes, the Court is precisely in the same position on the hearing of an originating summons as if there were really an administration action properly constituted, and that I have precisely the same jurisdiction under an originating summons as I should have in an administration action—neither more nor less. Therefore I proceed as if I had an administration action now before me. If I had an administration action, what I should have to do would be to administer the trusts, to construe them, and to see that they are properly performed without adding to them, except so far as any jurisdiction conferred on the Court by statute or otherwise enables me in any way to depart from them.

There is no trust or power in either of these settlements enabling the trustees or the tenant for life to dip into the capital for the purposes of these repairs; and, therefore, if the Court has power to authorize the expenditure, the jurisdiction must be found either in what is called the original jurisdiction of the Court (with deference to the Vice-Chancellor *Malins* I prefer that to "general jurisdiction"), or, in the statutory jurisdiction, that is to say, jurisdiction conferred by statute. It is not suggested that there is any jurisdiction conferred by statute, and I am not aware of any; and I am satisfied that if any words in the *Settled Land Act*, or elsewhere, would have assisted the Applicants Mr. *Ryland* would have called my attention to them. Therefore I must fall back on the original jurisdiction, and see whether that helps me. In support of the original jurisdiction I have been referred to some cases, which no doubt deserve attention. The first is *Frith* v. *Cameron* (1), and I see that that was brought before the Court by counsel of eminence and position in the presence of counsel of eminence; but I am not satisfied from the report that it was in any way argued. My conclusion would be from the report that it was not argued, that all parties were agreed that it was advantageous to make the order, and the judgment of the Vice-Chancellor *Malins* does not touch the question of jurisdiction. His judgment begins by saying, "I think that, under the peculiar circumstances of the case, it will be for the benefit of all parties that the decree asked

(1) Law Rep. 12 Eq. 169, 173.

for should be made," and then he proceeds to make the order under the general jurisdiction of the Court without any discussion in the argument or in the judgment of the Court whether that general jurisdiction existed, or how the order could be supported. I am not disposed to regard that case as of great authority on the point which I am now considering.

The next case is one which came before Mr. Justice *Kay*, and which was more closely considered, namely, *In re Jackson* (1), for there Mr. Justice *Kay* adjourned the case for further consideration, and the investigation of precedents, particularly the case of *Glover* v. *Barlow* (2), and the cases seem to have been brought before the Court by Mr. *Kenyon Parker* with a classification which is concise and useful. Then ultimately the Court made the order; but considering that it had authority to deal with property to which an infant was absolutely entitled, the Court relied on the large power which it has in dealing with the property of infants. I do not think that that case can be here relied on. The present case either does not come within any of the three classes which are mentioned by Mr. *Kenyon Parker*, or, if it does come within the first class, would be shewn by his classification to be in a class where the jurisdiction is not exercisable.

The case of *In re Household* (3) came before Vice-Chancellor *Bacon* in 1884. That also, I should say, was not argued on the question of jurisdiction, but it seems to me to be extremely near this case. There was no investment clause in the settlement. The trustees were there authorized to make the advance, and the tenant for life, as it happened, was willing to contribute a large sum towards the cost of the repairs. It was something more than repairs. It was stocking the farm and the cultivation of the farm.

The case of *In re Hotchkys* (4) can hardly be treated as a decisive authority for the proposition that there is jurisdiction, because the real question before the Court was on the construction and meaning of a will, and on the rights of parties claiming under it; but still there are expressions in the judgments of the Court

(1) 21 Ch. D. 786.
(2) Not reported.
(3) 27 Ch. D. 553.
(4) 32 Ch. D. 408.

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of Appeal which lean strongly in favour of the jurisdiction which I am asked to exercise, and are inconsistent with the view that no such jurisdiction exists.

I wish I had a case before me where the question of jurisdiction had been raised, argued, and decided. I know of nothing which requires more careful exercise of judicial power than the deciding on or granting applications where there is no real argument; the consent business of the Court being, according to my experience, as a rule, even more difficult than the contentious business. But I cannot help seeing that there is this case, *In re Household* (1), decided in 1884, in which the order was actually made; and I am free to confess that I am willing to find an authority for what I will assume to be, and for what I believe, from the evidence before me, will turn out to be for the advantage of the infants in this case.

I think, on these authorities, I am entitled to make the order; and if I am entitled to make the order, I am disposed to do so. I may point out that if the trustees were to make these repairs at their own risk, and then there was an administration action, and the trustees were called on to account, if they could prove to the satisfaction of the Court that what had been done had really preserved the property—no doubt a difficult thing to do afterwards—the Court would certainly have jurisdiction in an infant's suit to say that it was for the benefit of the infants that the property should be taken as improved, and that the trustees would not be made liable. One leans to the conclusion that the Court might do by anticipation what it might do afterwards. It is also settled by *Vyse* v. *Foster* (2) that where trustees have without authority expended money in a manner presumably productive of benefit to the estate, they are entitled in an action for an account to an inquiry what benefit that expenditure has produced. Therefore what I propose to do is to direct an inquiry to bring out the facts.

MINUTES OF ORDER.—An inquiry what repairs to the buildings and what new buildings are necessary in order to preserve the settled real estate in the

(1) 27 Ch. D. 553. (2) Law Rep. 8 Ch. 309.

summons and in the above settlements mentioned in such a state as to be tenantable or saleable, and the amount necessary to be expended in such repairs and new buildings.

And what repairs of such a character have been already made, and the amount which has been expended in respect thereof.

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Solicitors: *Clarke, Woodcock, & Ryland; Orford & Son, Manchester.*

C. M.

C. A.
1888
Dec. 12, 13;
1889
Jan. 23.

ESDAILE *v.* PAYNE.

[1880 E. 691.]

Practice—Extension of Time to appeal—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15; *Order* LXIV., *r.* 7.

L. & N., and other occupiers of houses in a *London* parish, were sued by the lay impropriator for an account and payment of sums payable in lieu of tithes under the statute 37 Hen. 8, c. 12. No payment appeared ever to have been made in respect of any of the houses occupied by the defendants. *L. & N.* pleaded only the *Tithe Prescription Act* (2 & 3 Will. 4, c. 100). Others of the defendants pleaded both that statute and the *Statute of Limitations* (3 & 4 Will. 4, c. 27). *Kay*, J., held that the former Act was a good defence, and dismissed the action, the question as to the *Statute of Limitations* not being argued. The Plaintiffs appealed. The Court of Appeal held that the statute 2 & 3 Will. 4, c. 100, was no defence, and remitted the case to be argued on the *Statute of Limitations*. *Kay*, J., on the 16th of July, 1885, held that the *Statute of Limitations* was no defence, and gave judgment for the Plaintiffs. Some of the Defendants (not including *L. & N.*) appealed, and the Court of Appeal dismissed their appeal. They then appealed to the House of Lords, which on the 10th of August, 1888, allowed the appeal and dismissed the action as against the Appellants, holding that there was a good defence under the *Statute of Limitations*. In December, 1888, *L. & N.* applied for leave to appeal from the judgment of the 16th of July, 1885, stating that the action was defended in their name by their landlords, who were bound to indemnify them, that the landlords were trustees of an estate which was being administered by the Court, and that the Judge had declined to sanction their appealing. It was admitted that the case of *L. & N.* was the same as that of the other Defendants:—

Held, by *Cotton* and *Bowen*, L.JJ., that the fact that the Judge in the administration action had declined to give leave to appeal was no excuse for not appealing in due time, but that it would be unjust for these Defendants not to have an opportunity of appealing from a judgment which the House of Lords had pronounced to be wrong, and that leave to appeal ought to be given.

Before the order had been drawn up, the application, by leave of the Court, came on for re-argument, together with an application by *H.*, another Defendant, for leave to appeal. It was shewn that after the time for appealing had expired the tithes payable in respect of *L. & N.'s* property had been sold and paid for, and a compromise as to the tithes of the parish had been carried out by Act of Parliament, which must be taken to have gone on the footing that *H.* was liable to pay tithes:—

Held, by *Cotton*, *Lindley*, and *Lopes*, L.JJ., that under these circum-

stances leave to appeal ought not to be given either to *L. & N.* or to *H.*, and, *semble*, that even apart from those circumstances it ought not to be given, the Applicants not shewing any special circumstances.

THIS was an action commenced on the 29th of September, 1880, by the owner of the impropriate rectory of *St. Botolph Without, Aldgate*, against various occupiers of property within the parish, including Messrs. *Lane & Neeve*, for an account and payment from Easter, 1879, of certain yearly sums payable in lieu of tithe under the statute 37 Hen. 8, c. 12, at the rate of 2*s.* 9*d.* in the pound on the rental.

Lane & Neeve by their defence alleged that they and the previous occupiers had held their property for sixty years, or at all events for thirty years, before action brought, without any payment of tithes or money in lieu of tithes, and they claimed the benefit of the Act 2 & 3 Will. 4, c. 100, intituled "An Act for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes." Others of the Defendants pleaded both that statute and the *Statute of Limitations* 3 & 4 Will. 4, c. 27. The Plaintiff having died, the action was revived by his executors and devisees in trust. At the trial of the action before Mr. Justice *Kay* it appeared that no payments under the Act 37 Hen. 8, c. 12, had ever been made in respect of any of the properties occupied by the Defendants, and his Lordship dismissed the action on the ground that the statute 2 & 3 Will. 4, c. 100, was a good defence. The Plaintiffs appealed from this decision, and on the 29th of January, 1885, the Court of Appeal reversed it, being of opinion that the statute 2 & 3 Will. 4, c. 100, did not apply to claims for statutory tithes under the statute 37 Hen. 8, c. 12. The action was accordingly remitted to Mr. Justice *Kay* to be argued on the other defences, and his Lordship on the 25th of April, 1885, gave a judgment in favour of the Plaintiffs. The decree, which bore date the 16th of July, 1885, gave costs against *Lane & Neeve* and others of the Defendants, and directed an account of what was due, and payment of what should be found due on the account. Some of the Defendants who had pleaded both the statutes appealed from this decree. On the 19th of February, 1886, the Court of Appeal dismissed the appeal, holding that neither the statute 2 & 3

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Will. 4, c. 100, nor the statute 3 & 4 Will. 4, c. 27, was a defence to the claim. The unsuccessful Appellants then presented an appeal to the House of Lords. On the 10th of August, 1888, the appeal was allowed, the House being of opinion that although the statute 2 & 3 Will. 4, c. 100, afforded no defence, the payments imposed by 37 Hen. 8, c. 12, were "annuities or periodical sums of money charged upon land" within the meaning of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), sect. 1, and that that statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action (1).

On the 1st of December, 1888, *Lane & Neeve* served on the Plaintiffs a notice of motion before the Court of Appeal that *Lane & Neeve* "may be at liberty to serve notice of motion by way of appeal against the judgment of Mr. Justice *Kay* herein dated the 16th of July, 1885, and to set down such appeal accordingly, notwithstanding the time for so doing has expired, upon the ground that it has since been decided by the House of Lords that judgment ought to be entered for the Defendants with costs, and that the said Defendants were precluded from being parties to such appeal through no fault of their own, but because leave to join in such appeal was refused in an administration action."

The reasons which *Lane & Neeve* gave for not having joined in appealing from the judgment of the 16th of July, 1885, were as follows: *Lane & Neeve* were tenants of the property in respect of which they were made Defendants. This property was vested in the trustees of a settlement, and all the proceedings on behalf of *Lane & Neeve* in the action had been conducted by the trustees, who as landlords had covenanted to indemnify *Lane & Neeve*, and were allowed to defend in their names. The trusts of the settlement were being carried into effect under the directions of the Court, and the trustees defended under the directions of the Judge in Chambers. After the decision of the Court of Appeal on the 29th of January, 1885, the Judge in Chambers refused to give the trustees leave to appeal, and directed them to take no further active part in the defence. The trustees accordingly paid £54 16*s.* 3*d.* by way of tithes and £53 3*s.* 10*d.* for costs

(1) 13 App. Cas. 613.

specially ordered to be paid by *Lane & Neeve* to the Plaintiffs, and they apprehended that they might have to contribute towards the general costs ordered to be paid to the Plaintiffs, amounting to £475 9*s.* 3*d.*

Dec. 12. *Ashton Cross,* for the motion :—

It was not our fault that we did not appeal. The trustee of a property which is being administered by the Court cannot be expected to appeal unless the Court gives him leave, for if it does not, he pays costs out of his own pocket if he fails, and gains nothing if he succeeds. The case is one where justice requires that an extension of time should be given: *In re Manchester Economic Building Society* (1).

Maclean, Q.C., and *Howard,* for the Plaintiffs :—

The appeal in the House of Lords succeeded on the *Statute of Limitations,* which *Lane & Neeve* never pleaded. The House of Lords having decided in favour of other parties on a point which the present Applicants did not think fit to take, they come three years after the judgment and ask for leave to appeal against it. The rule used to be that a successful party was entitled to the benefit of the rules limiting time for appealing unless he had done something to raise an equity against him: *McAndrew* v. *Barker* (2). That rule has been modified to some extent, but not abrogated, and a person seeking leave to appeal after time must shew special circumstances. What do the Applicants allege? That the Judge in the administration action prevented their appealing. But he did not, he only refused to give them a sanction which would have entitled them to have the costs of an unsuccessful proceeding out of the trust estate. They might have appealed without any leave, and what took place in the administration action is not a matter that can affect the Plaintiffs. That there has been a subsequent decision of an Appellate Court the other way is not a reason for allowing an extension of time: *Craig* v. *Phillips* (3).

(1) 24 Ch. D. 488. (2) 7 Ch. D. 701.

(3) 7 Ch. D. 249.

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Ashton Cross, in reply:—

In *Craig* v. *Phillips* (1) it was not clear that the law laid down in the decision sought to be appealed from had been altered. Here it is quite clear that the judgment against us is wrong, the decision of the House of Lords being in the same case, and, having regard to that, the judgment of Lord Justice *Thesiger* in *Craig* v. *Phillips* is in my favour.

1888. Dec. 13. COTTON, L.J.:—

This is an application in a most unfortunate litigation. It is an application to us to allow the judgment of Mr. Justice *Kay* to be appealed from, although that judgment was given in the year 1885. This is an action against several occupiers of houses in the city of *London*, the Plaintiff claiming as lay rector that they are liable to pay tithes in respect of their houses under the Act 37 Hen. 8, c. 12. Mr. Justice *Kay* first of all decided that the *Tithe Prescription Act* (2 & 3 Will. 4, c. 100) was a good defence. There was an appeal to this Court, and it was decided that Mr. Justice *Kay* was wrong. Another question, however, was raised which had not been argued before Mr. Justice *Kay*, or decided by him, whether the *Statute of Limitations* (3 & 4 Will. 4, c. 27) applied to the case, and the Court of Appeal thought that the case ought to go back to Mr. Justice *Kay* on that point. The case accordingly was heard again before Mr. Justice *Kay*, and he decided that the *Statute of Limitations* did not apply. There was an appeal to us by some of the Defendants, but not by the Defendants who make the present application. We decided that Mr. Justice *Kay* was right on this point, and that the *Statute of Limitations* did not apply. Some of the Defendants, not including the present Applicants, went to the House of Lords, and the House of Lords decided that this Court was right in the first judgment but wrong in the second, and that the ordinary *Statute of Limitations* did apply. The action, therefore, was dismissed as against the Defendants who appealed to the House of Lords. That was in August last. Then the present Applicants say: "We ought to be let free from that judgment, which has been

(1) 7 Ch. D. 249.

pronounced by the House of Lords to be wrong, and under which we have paid some £54 for tithes so called, and some £53 for costs, and are liable to more costs." The Applicants give reasons why we should relieve them from the bar which the time that has elapsed puts in the way of their appealing, but I do not think that they have alleged any sufficient reason. What they said was simply this, that they were entitled to be indemnified by somebody else, who defended the action in their names, and who applied in an administration action to have liberty to go on with the defence to the action, the giving which liberty would indemnify him against costs, that the Judge refused to give him this liberty, and so he did not appear before Mr. Justice *Kay* when the case came before him the second time, nor did he appeal in time to this Court. That excuse certainly is insufficient, for it comes merely to this, that a man did not like to go on at his own risk when he could not get the Court to say that he should have his costs provided for whether he succeeded or failed. That to my mind is no excuse at all. For a man to say that he did not like to incur the risk of going on is no excuse for his delay. He must take the consequences.

But then there is this circumstance: The House of Lords has decided in this very action, and in favour of Defendants whose cases are admitted to be exactly similar to that of the present Applicants, that the Plaintiffs have no case. Now it certainly seems wrong that Defendants who retired from the litigation and did not raise the point on which the Defendants who appealed to the House of Lords were ultimately successful, should be adjudged to pay the amount of the tithe claimed from them, and also to pay costs. We think it would not be consistent with justice to allow that to take place. We think, therefore, that there ought to be an extension of the time for appealing, and that if an appeal is brought before us, we ought to direct to be repaid to the present Applicants the sums which they have paid for tithe and for costs, and that we ought to reverse the judgment as against them and put them in the same position as the Defendants who appealed to the House of Lords. But we should give the Applicants no costs of the appeal nor of the action, and they must pay the costs of this present application. In order

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to save expense we will make an order to that effect at once if the parties agree to treat this as the hearing of the appeal. If they do not agree to that, then on the Applicants giving notice of appeal, we will have the case put in the paper at once to be disposed of.

BOWEN, L.J. :—

I quite agree. The principle which we are applying in this case is a principle which we have applied before. The present Applicants have no doubt made a slip—a grave slip. Their counsel did not think the point worth arguing before Mr. Justice *Kay*, and they did not come here on appeal. But if they had, they would not have got much out of it, because we were as wrong as the counsel who thought the point unarguable. We thought it was untenable. The House of Lords has said that it is a good point, and, therefore, a good point it is. It would, then, seem a singular position if the other Defendants who have taken the point were to escape scot free, and that these Defendants who did not take it should have not only to pay the tithe which is not due from them, but to pay costs which, if they had taken the point in time could not have been adjudged against them, and be liable also to further costs. The Plaintiffs would thus get a windfall of rather an extraordinary character, because of a point not being taken at the right time in the Court below. If we could see that this could not be cured without inflicting injustice in the case upon the Plaintiffs, that would be a different thing, but it does not seem to me (and my learned Brother has expressed his own view to the same effect) that this is a case in which we cannot restore the parties to the same position as they were before by imposing terms, and, therefore, I think that the time for appealing ought to be extended on terms. I assume that there is no fresh point in this appeal different from what there was in the other, because we were told that the questions are identical. I think, therefore, that justice will be done by reversing the judgment as against these Defendants, and by the Plaintiffs accordingly paying back the costs and tithes which they have unjustly received by reason of the Court having gone wrong. But, on the other hand, as these Defendants from first to last did

not plead the *Statute of Limitations*, and never took the point, and never appealed, we cannot give them the costs of the action in which they took no step that was fruitful. Therefore, they ought to have no costs of the action and no costs of the appeal. Moreover, they are now applying for an indulgence, for an extension of the time for appealing, and that indulgence could only be reasonably granted on their paying the costs of this particular application. We cannot do all this at one step, for this is only an application for an extension of time. The true appeal is not before us, but as we have been told that there is no distinction between the two cases, it is manifestly for the interest of both sides to convert this at once into the hearing of the appeal, and let us do the full justice now which we shall do when the hearing comes on, assuming those facts to be correct. If the Plaintiffs, whose interest is now to make an end of this litigation, which cannot be fruitful to them, decline to let this be the hearing, the only thing will be to give the leave required on the terms of the costs of this application being paid, and when the notice of appeal is given let it be put in the paper at once, and then we shall make the order which, if we are rightly informed about the facts, is the proper order to be made.

The case was mentioned again on the 15th of December, and the Plaintiffs' counsel not consenting to treat this as the hearing of the appeal, an order was made simply giving the Applicants leave to appeal on payment of the costs of the application.

On the same day the Plaintiffs gave notice of motion before the Court of Appeal that the drawing up of the order, which was still in minutes, might be stayed, and the application re-heard, by reason of material facts, relating to the interests of third parties who would be prejudicially affected by such order, and otherwise relating to the matters in question not having by inadvertence been brought to the attention of the Court.

On the 13th of December, after the judgment on that day had been delivered, *Hill*, another Defendant, who had pleaded the *Statute of Limitations*, and had argued the case before Mr. Justice *Kay* throughout, but had not appealed from the judgment of the

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16th of July, 1885, gave notice of motion for leave to appeal from that judgment.

The Plaintiffs in support of their application for re-hearing filed an affidavit by Mr. *Hopkinson*, one of the solicitors of the *Metropolitan Railway Company*, from which it appeared that the railway company were empowered by one of their Acts, in lieu of compensating the impropriator for loss of tithes on the properties taken by the company, to purchase the tithes payable in respect of them. In May, 1884, the purchase-money of the tithes payable in respect of various properties taken by the railway company, including those payable in respect of *Lane & Neeve's* holding, was fixed by arbitration at £31,670. Before completion the title was investigated. The solicitor stated that while investigating the title he became aware of the litigation—that on the 5th of January, 1886, the then solicitors of *Lane & Neeve* called on him and said that the Plaintiffs had claimed from them sixteen quarters' tithes, ending Michaelmas, 1886, and that as *Lane & Neeve* were only tenants for the residue of a term of twenty-one years, they should pay, as they were not prepared to appeal unless they were indemnified by the company, who had already purchased the freehold. Mr. *Hopkinson* went on to say that before completion he ascertained that the time for *Neeve* and *Hill* to appeal had long since expired, and he completed the purchase on the 23rd of May, 1888, which he would not have done without an abatement if *Lane & Neeve* had appealed.

On the 11th of January, 1889, the two applications came into the paper, and the Court gave leave to have *Lane & Neeve's* application re-argued. It was arranged that this re-argument and the hearing of *Hill's* application should come on together.

The following facts were relied upon in opposition to *Hill's* application.

On the 11th of August, 1881, an Act had been passed, *London City Tithes (St. Botolph Without, Aldgate) Act*, 1881 (44 & 45 Vict. c. cxcvii.), whereby the sums payable in lieu of tithes in the parish were extinguished as from the 29th of September, 1881, and it was provided that the tithe owner should receive in lieu of them a yearly sum of £6500, to be levied by the churchwardens by a rate upon the properties in the parish that were

liable to poor-rates, except certain properties mentioned in a schedule, which had been taken by the *Metropolitan Railway Company*. The property occupied by *Lane & Neeve* was included in this schedule. By sect. 5 it was provided that if any owner or occupier of property in the parish claimed that it was exempt from tithe, or entitled to the benefit of any modus, composition, or customary payment, the question should be determined by the Tithe Commissioners, and thereupon the churchwardens should include such property in the tithe-rate, or exempt it wholly or partly from the tithe-rate, as the case might be.

On the 28th of June, 1888, an Act was passed, *The St. Botolph Without Aldgate Tithe-rate Act*, 1888 (51 & 52 Vict. c. lxix.), which recited difficulties that had occurred in carrying out the former Act, and that the tithe owner had agreed for twenty-one years from the 25th of March, 1888, to accept on the terms therein mentioned the annual sum of £5000 in lieu of the £6500, and made a provision for his accepting during that term £5000 a year instead of £6500 on punctual payment. Certain additional powers were given for facilitating the raising of the yearly sum. Sect. 19 was as follows: "Whereas an appeal to the House of Lords is now pending in a suit between *John Payne and Others*, appellants, and *W. C. D. Esdaile and Another*, respondents, be it enacted that nothing in this Act contained shall be held or construed to prejudice or affect the rights or position of the parties to the said suit, or any or either of them, or in any way affect any judgment already delivered or which may be delivered in the before mentioned appeal in such suit, or alter or vary the effect of the same."

1889. Jan. 23. *John Henderson*, in support of *Hill's* application:—

The special circumstances alleged by *Lane & Neeve* in support of their application do not exist in my case, but the Court did not go upon them. The special circumstances on the ground of which their application is allowed to be re-heard do not exist in my case, and it is better than that of *Lane & Neeve* in two respects, that *Hill* pleaded the *Statute of Limitations*, and that he never stated his intention not to appeal. I rely upon the grounds

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taken in the judgments delivered on the 13th of December. The Plaintiffs contend that the effect of allowing *Hill* to appeal will be to throw on the other householders in the parish a greater burden than was contemplated when the Act of 1888 was passed, but the 19th section of that Act provides that nothing contained in it shall affect the rights or position of any of the parties to this suit. It therefore reserves our rights.

Maclean, Q.C., and *Howard*, for the Plaintiffs :—

Much of our argument is applicable to the motion of *Lane & Neeve* as well as to this. Mr. *Hill's* counsel admits that he has no special circumstances. If so, the neat question arises whether if a decree is made against several defendants who have precisely similar cases, so that the decree if right is right as to all, and if wrong is wrong as to all, and one of them successfully appeals to the House of Lords, that appeal is to enure to the benefit of all the defendants who have not appealed. We submit that to hold that it does so enure would establish a very dangerous precedent. Suppose an action against a number of directors for fraudulently inducing the plaintiff to take shares, the cases of all the directors being identical, and a joint and several decree being made against them. One alone appeals just within time, and ultimately succeeds. In the meantime the plaintiff has recovered a substantial amount from the others. Are they to have leave to appeal and make him refund ? There can be no finality in litigation if such a rule is adopted and carried to its consequences. A plaintiff, if all the defendants appealed, might say his interest was not sufficient to make it worth his while to contest the case, when, if the time for the others to appeal had passed, he might think it worth while to fight out an appeal by one. Suppose again an action which is dismissed as against a body of directors. The plaintiff appeals against one who is reputed the most solvent, he carries the case to the House of Lords and succeeds. He then finds that this defendant is insolvent. Can he obtain leave to appeal as against the others. It has been ruled that a decision on an appeal in another action is no reason for extending the time : *Craig* v. *Phillips* (1) ; and what difference can it

(1) 7 Ch. D. 249.

make whether the decision in the House of Lords is in the same action or in another action, if the cases are identical? In each case it is conclusively shewn that the decision sought to be appealed from is wrong. The object of Order LVIII., rule 15, and Order LXIV., rule 7, is that a litigant may know when the litigation is ended. In every reported case in which the time for appealing has been extended, there has been conduct on the part of the respondent, or mistake, or surprise. Here nothing is alleged under any one of those heads. A successful party has, as has been said in some of the cases, a vested interest in the judgment after the time for appealing has expired. Under the old practice a strong case was required for vacating an inrolment: *Wildman* v. *Lade* (1). This is a final judgment, and the Court will be less disposed to extend the time than in the case of an interlocutory order: *Collins* v. *Vestry of Paddington* (2). There has been a growing inclination in the Legislature and the Courts of late years to restrict the time for appealing: *Curtis* v. *Sheffield* (3). The case of *In re Manchester Economic Building Society* (4) went on the ground of mistake on the part of the applicant, and something nearly amounting to fraud on the part of the company.

Then as to the facts subsequent to the judgment appealed from. When the Act of 1888 was passed the judgment of Mr. Justice *Kay* was standing as against all parties, and *Hill's* time for appealing against it had expired. *Hill* therefore was liable to this payment, and the compromise effected by that Act must have gone on the footing that he was. If the judgment against him is now reversed his property will be exempted, and an extra burden will be thrown upon the other ratepayers. It is argued that sect. 19 of the Act of 1888 keeps alive the rights of every party to the action, but it does not do so, it only keeps alive the rights of the parties to the appeal. The case of *In re Normanton Iron and Steel Company* (5) is against allowing leave to appeal where the effect of an appeal would be that sums paid under the order could be recovered back.

(1) 4 De G. & J. 401.
(2) 5 Q. B. D. 368.
(3) 21 Ch. D. 1.
(4) 24 Ch. D. 488.
(5) 29 W. R. 300.

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J. Henderson, in reply:—

If the settlement of 1888 was based on any calculation what properties were liable to the rates, the churchwardens should have given evidence to that effect. As regards sect. 19 of the Act of 1888, it distinguishes between the appeal and the suit. So "parties to the suit" cannot mean "parties to the said appeal."

Ashton Cross, for the application of *Lane & Neeve*:—

No injustice can be done to the railway company by allowing *Lane & Neeve* to appeal. The company bought the property subject to the tithe, and bought the tithe. They would get the property so much the cheaper on account of the supposed existence of the tithe, and the amount of the two purchase-moneys is the value of the property free from tithe. There is therefore no objection on the ground that allowing an appeal will injure third parties. The payments made by *Lane & Neeve* will not revive the right against which the statute has run: *Sanders* v. *Sanders* (1). The decision in *Craig* v. *Phillips* (2) appears to have gone on the grounds stated by *Thesiger*, L.J.

[LOPES, L.J.:—The judgment of the Master of the Rolls must also be looked to.]

The decision there was not a decision in the same action.

[LOPES, L.J.:—Why is that a distinction?]

That the House of Lords has pronounced the action not to be maintainable is a special circumstance.

[LOPES, L.J.:—Would it have been right after the decision in *Metropolitan Railway Company* v. *Jackson* (3), which introduced an entirely new rule as to liability for negligence, to allow all the railway companies against which judgments for negligence had been recovered on the same ground as those taken by the Courts below in that case, to appeal?]

No; because that would lead to fresh litigation.

Maclean, Q.C., and *Howard*, for the Plaintiffs, were not called upon.

(1) 19 Ch. D. 373. (2) 7 Ch. D. 249.
(3) 3 App. Cas. 193.

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We have to dispose of two motions, one of which has been already heard here, but the facts were not so fully before the Court, nor was the case so fully argued, as on the present occasion. This motion we gave leave to have re-argued; the other comes before us for the first time.

On the former hearing of the application by *Lane & Neeve* the Court thought that leave to appeal ought to be given them. I give no opinion whether, on the facts as they then appeared, that view was right; but I have been struck by Mr. *Maclean's* argument, and I doubt whether the conclusion at which the Lord Justice *Bowen* and myself then arrived was right. The object of the rules is to prevent the continuance of litigation, and only to allow the time for appealing to be extended under special circumstances. When the case was before the Court on the former occasion we did not know that the property had been dealt with after the judgment. It now appears that the *Metropolitan Railway Company* bought the tithes payable in respect of *Lane & Neeve's* property after their time for appealing had expired; at a time, therefore, when the company had a right to conclude that there would be no appeal, and after *Lane & Neeve* had stated their intention not to appeal. I think that after this dealing with the property it would be wrong to give these Defendants an extension of the time for appealing. I do not think it necessary to decide whether, if *Lane & Neeve* were allowed to appeal, and to establish that their property, the tithes on which the company bought, was free from tithe, the company would have a good case against the Plaintiffs. It is enough to say that the probability of a claim being made against them is a good reason for not granting *Lane & Neeve* an indulgence by allowing them to appeal. An appeal by them, which, if they are allowed to bring it, must be successful, might give rise to future litigation between the Plaintiffs and the company, and leave to appeal ought not to be granted. If we had known the facts when the case was before us on the former occasion, I think that we should then have refused leave.

Then as regards Mr. *Hill's* application. He knew that there was an appeal by other Defendants, and that the law was some-

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what uncertain, and he elected not to appeal. Ought he to be allowed to appeal now? I think that after what has since happened, he ought not. The Act of 1881 extinguished the tithes in the parish, and gave in lieu of them a fixed yearly sum, to be raised by means of a rate to be levied by the churchwardens on all property in the parish that was liable to poor-rates, with the exception of certain specified lands, and of lands not liable to tithe. In 1888, shortly before the judgment of the House of Lords on the appeal, an Act was passed to give effect to an arrangement by which, for a term of years, a smaller annual sum was to be accepted. We cannot enter into the question how that bargain was arrived at, but we must take it to have gone on the footing that the Defendants who had not appealed were liable to tithes. The fact of this arrangement having been come to after it was supposed that the decree was binding, is a sufficient reason why Mr. *Hill* should not be allowed to appeal.

As regards costs, the circumstances on which the Plaintiffs now rely were known to them all along, and ought to have been brought before us when *Lane & Neeve's* application was first heard. We therefore refuse that application without costs. *Hill* was induced to make his application by the apparent success of the motion of *Lane & Neeve*, and his application will also be refused without costs.

LINDLEY, L.J.:—

I am of the same opinion. It may appear harsh that these Defendants should be bound by a decree which the House of Lords has decided to be wrong, but the more I consider the matter, the more I think it just. Suppose an action for tithes brought against six holders of property, and a decree made against them all. Five out of the six submit and allow the time for appealing to expire. It is important that a state of things so brought about should not lightly be disturbed. The sixth Defendant is bolder; he appeals; and at last he obtains from the House of Lords a decision in his favour. The other five then naturally wish to appeal. What ought to be done? In my opinion it is for the interest of the public that litigants should know as soon as possible when certainty has been reached, and

that if people have deliberately elected to let the time for appealing go by, the Court should not give them leave to appeal without special circumstances. I make these remarks because I wish that there should be no doubt as to the general principle. I do not, in the present case, go on that broad ground, because here there are circumstances which, in my opinion, are conclusive. An Act was passed by arrangement in 1888 altering the condition of the property under a former Act of 1881, and only saving the rights of the parties to the appeal. It would be unjust after this to allow *Hill* to escape from the burden and throw it on the other ratepayers. *Lane & Neeve* do not come within the scope of the Acts, but after their time for appealing had expired, the Plaintiffs sold the tithes which, according to the decree, were payable by *Lane & Neeve*. The Plaintiffs may have covenanted for title, and, at all events, if *Lane & Neeve* were successfully to appeal, the Plaintiffs might be involved in further litigation. Leave to appeal ought, therefore, not to be given. I agree with the Lord Justice *Cotton* as to the costs.

LOPES, L.J. :—

I am of the same opinion. I am ready to rest my conclusion on the same grounds as my learned Brothers, viz., that what has taken place since the decree would make it unjust to give leave to appeal. But I must add that, apart from these circumstances, the case appears to me not distinguishable from *Craig* v. *Phillips* (1), with the decision in which I entirely agree. Though a strict adherence to rules as to time may sometimes produce hardship, I think that a loyal adherence to them is best for the public and for litigants.

Solicitors : *Winter & Co. ; Rhodes & Son ; Henderson & Buckle.*

(1) 7 Ch. D. 249.

H. C. J.

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In re GORTON.
DOWSE *v.* GORTON.

[1887. D. 5484.]
[1887. D. 5498.]

Administration—Power to Executors to carry on Business—Right of Executors to Indemnity—Rights of Creditors of Testator and subsequent Creditors of the Executors.

Executors carried on the business of their testator under a trust contained in his will. A question having arisen between the creditors of the testator and the trade creditors of the executors as to priority:—

Held, that as against the assets of the testator existing at his death, the creditors of the testator were entitled in priority to any claim by the executors to indemnity in respect of the trading liabilities; and that the trade creditors of the executors had no better claim than the executors:

That as against the assets subsequently acquired by the executors in the course of their business, the executors had a claim for indemnity out of those assets in respect of their trade liabilities in priority to the creditors of the testator: and that the trade creditors of the executors were entitled to stand in the place of the executors in enforcing their claim to indemnity:

That if the executors were themselves indebted to the testator's estate, their claim to indemnity and the claims of their creditors through them failed to the extent of their indebtedness.

THIS was an appeal from a decision of Sir *H. F. Bristowe*, Vice-Chancellor of the County Palatine of *Lancaster*.

By an agreement dated the 25th of September, 1874, *Luke Turner* agreed with *John Gorton* and another person named *Shemilt* for the sale to them of his business of an elastic cord manufacturer, in *Manchester*, and his interest in the mill, machinery and plant, for £19,487, to be paid in instalments; and it was agreed that the purchasers and the survivor of them should carry on the business till all the instalments were paid. *L. Turner* died in 1874, and the Plaintiffs were his executors. *J. Gorton* survived *Shemilt* and died in December, 1883. At that time £8487 was due for principal and interest to the executors of *Turner*. *J. Gorton* left a will appointing his widow and *J. W. Gorton* his executors and trustees, and he declared that

it should be lawful for his trustees, in case they should in their uncontrolled discretion think fit, to continue for such period as they might think fit any business in which he might be engaged at his death, and to engage and employ in any such business such part of his estate and effects as they should think desirable.

The executors of *Gorton* carried on the business, using therein the assets of the testator. At the time of his death his assets were sufficient to discharge all his liabilities; but in carrying on the business his executors incurred trade debts to a considerable amount, including a debt for goods sold and delivered to Messrs. *Riley & Sykes*.

At the present time the assets of the testator in the hands of the executors were insufficient to pay the debt due under the agreement with *Turner*, and the liabilities incurred by the executors in the conduct of the business. *Turner's* executors accordingly brought an action for the administration of *Gorton's* estate, and also brought an originating motion asking that the following questions might be determined by the Court:—

1. Whether the executors of *J. Gorton* were entitled, as against the persons to whom he was indebted at the time of his death, to be indemnified out of his estate, or any part thereof, against debts and liabilities incurred by the executors in carrying on his business.

2. Whether all his book debts, stock, and the assets of the business carried on by the said *J. Gorton* at the time of his death, and now due and owing in respect of the said business, or belonging to the same, ought not to be applied in payment of the debts due by the said *J. Gorton* at the time of his death, in priority to any claim of his executors for indemnity, or to any claim of the persons with whom such executors dealt in carrying on the said business.

The motion also asked for administration of the estate in accordance with the opinion of the Court.

The Vice-Chancellor, on the 23rd of November, 1887, made an order on the motion answering the second question in the affirmative, and giving no answer to the first question; and from this decision the business creditors of *Gorton's* executors appealed.

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Cozens-Hardy, Q.C., *S. Hall*, Q.C., and *Staffurth*, for the Appellants:—

The Vice-Chancellor has carried the rights of the creditors of the testator too far. If they claim independently of the will, which we say is the true view, they cannot take the benefit of any assets which have been acquired since the death of the testator under the trusts of his will. If they claim any rights under the will, they must claim subject to the right of the executors to indemnity in carrying on the business. The assets acquired by the executors are not assets of the testator, and the subsequent creditors are not creditors of the testator, but of the executors personally; but they are entitled to stand in the shoes of the executors as to their right of indemnity. Therefore, the claims of the creditors of the testator must be restricted to such assets as they can prove to have belonged to the testator at the time of his death: *Ex parte Garland* (1); *In re Johnson* (2); *In re Morgan* (3). *In re Evans* (4) has no application to this case. The question there was as to a vendor's lien on the produce of sale of goods sold to the executors.

Buckley, Q.C., and *Hopkinson*, for the creditors of the testator:—

The Vice-Chancellor's judgment is borne out by *In re Evans*, and is not inconsistent with *In re Morgan*. We admit that the executors have a right to be indemnified out of the assets, and that the Appellants are entitled to stand in their shoes, but that right to indemnity can only be subject to the rights of the original creditors. Their right is independent of the will, and paramount to the trusts of it. The assets acquired by the executors are assets of the testator; they have been acquired by means of the assets which he left at his death, and it is impossible to distinguish the part of the estate which was acquired before his death and what afterwards. It is all one estate, and is all subject to the paramount claim of his creditors: *Cutbush* v. *Cutbush* (5).

Maberley, for *Gorton's* executors.

(1) 10 Ves. 110.
(2) 15 Ch. D. 548.
(3) 18 Ch. D. 93.
(4) 34 Ch. D. 597.
(5) 1 Beav. 184.

COTTON, L.J.:—

This is an appeal against so much of the decision of the Vice-Chancellor as declared that "the book debts, stock, and other assets of the business carried on by *John Gorton* at the time of his death, and now due and owing in respect of the said businesses, or either of them, or belonging to the same, ought to be applied in payment of the debts due by the said *John Gorton* at the time of his death in priority to any claim of his executors or administrators, and then gave other consequential accounts."

What happened was this. At the time of the testator's death there were certain debts due and owing by him, but there are very few now remaining, the principal being a sum due in respect of the purchase-money payable by him to the executors of the vendor of the business which he carried on. By his will he empowered his executors to carry on his business, and they did carry it on; and, in carrying on that business, they became liable for certain sums of money for goods sold and delivered, and other matters. The trade-creditors contend that they are not creditors of the testator but creditors of his executors, and what they say is, in my opinion, correct. They are not entitled to any lien at all against the assets of the testator—those which were his at the time of his death—and they have no claim against anything except in this way, that they have a claim against the executors personally, and, then, if those executors have any claim of indemnity against the estate, they are entitled to have that indemnity applied for their benefit—that is to say, they are to stand in the place of the executors in enforcing the indemnity. That, in my opinion, is right. Where a business is carried on after the death of the testator, of course the persons who supply goods are in no way creditors of the testator. They cannot make any claim against the executors as executors; but they can make a claim against the executors as the persons who dealt with them and on whose order they supplied the goods. Then if the executors are entitled to be indemnified they will stand in the place of the executors in enforcing that indemnity.

What is contended for on the other side is this. They say that the persons who dealt with the executors and supplied goods which came into the possession of the executors are not entitled

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to any indemnity till all the creditors of the testator are paid. It seems to me that that is not right. What the creditors of the testator seek to do is this. They seek to have the benefit of those services supplied by the trade creditors of the executors for the benefit of the estate without making any provision for them. But the creditors of the executors, who are not the creditors of the testator, cannot make any claim to be paid anything out of what estate there may be in the hands of the executors if the executors themselves are indebted to the estate, so that they have got in their own pockets that out of which they ought to take their indemnity; and I think an account must be taken so as to ascertain what claims the executors have by way of indemnity against the estate. So far as concerns the original assets of the testator, they cannot, of course, claim as against the creditors of the testator. All they could claim would be an indemnity against their expenses in realising the assets of the testator. That there is no doubt about. They will only be liable for the money they get properly from realising those assets. Where there are liabilities undertaken under the direction of the testator's will they are entitled to an indemnity in respect of them out of the assets acquired by the executors after the testator's death. The creditors of the testator say, these are assets of our testator, and he could not by declaring a trust for you to perform give you any right of indemnity as against the property. That is not correct.

I think there must be a declaration that the executors of the testator are entitled, in priority to the persons to whom he was indebted at the time of his death, to be indemnified out of such part of the estate as has been acquired by the executors since his death against debts or liabilities incurred by the executors in carrying on this business for the full amount of such debts or liabilities; or, if the executors be in default to the testator's estate, then to the full amount of such debts or liabilities after deducting the amount in respect of which the executors are so in default. That is to say, you do not want a separate account of the carrying on of the business, but the executors must have their accounts taken; and if, in taking the accounts, it appears they are indebted to the estate, then they have got in their pocket the money out of which the indemnity to which they are

entitled ought to be paid; but if they are not indebted to the estate then they have a right to be indemnified. Then the property which was the testator's at his death must go in favour of the creditors of the testator, and, consequently, the directions given which entitle the executors to an indemnity will be withdrawn from their claim in the administration of the estate. I think that will work it out.

Then this, which is merely of course, should be added, that the persons with whom the executors dealt in carrying on the business, and to whom they are now under any debts or liabilities in respect thereof, may be declared to be substituted for, or entitled to the right of, the executors with regard to the said indemnity as to such debts or liabilities. In my opinion that is a correct declaration, and the inquiries or accounts for carrying that into effect, if they are not already in the decree, must be added. That is the correct principle on which this case is to be decided. If the executors have dealt with the estate so as to make a large sum due from them they will not be entitled to any such indemnity, or rather they will be entitled to an indemnity, but, as I have already said, they have got the money in their purse to satisfy that.

LINDLEY, L.J.:—

The question raised by this appeal can only be answered by considering, first of all, the rights of the creditors of the deceased, and, secondly, the rights of those who have become creditors of the executors since his death, and by adjusting those two rights where they appear to conflict.

Now, what is the right of the creditor of the deceased? He is a creditor, he has no equitable rights as distinguished from legal rights against the assets of the deceased. His right is to sue the executor at law and get a judgment at law *de bonis testatoris*, and under that to seize under a *fi. fa.* the assets of the deceased in the hands of the executors at the time of his death. But he has nothing to do with future acquired property. That is his right at law. But then, if the executor has so dealt with the assets as to have increased them, the executor cannot put the accretion into his own pocket; neither can he hand it over to

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the legatees or next of kin so long as the debts of the testator are unpaid. Therefore I think it is plain that the creditors of the testator can get the subsequently-acquired property, but not on the same footing that they could get the property of the testator which were assets of the testator at the time of his death. The creditor of the testator can only get the after-acquired property on terms which are just. He cannot take the property from the executors and make the executors pay for it out of their own pockets. He can only have the property subject to the right of the executors to indemnity, that is to say, he cannot throw the cost of getting the assets on the executors, and take the assets regardless of that cost. The right of the executors to be indemnified out of the subsequently-acquired property lets in the rights of those to whom they are liable, that is to say, the creditors who have become such in the course of the executors trading or carrying on the business. Such are the rights of the creditors of the deceased.

Now, let us look at the rights of those who have dealt with the executors after his death. The right of those is to sue the executors. I believe there are some very exceptional cases in which subsequent creditors can get the assets, and I think there is authority for saying that funeral expenses can be got out of the assets; but with those exceptions the right of subsequent creditors is to sue the executors. They have nothing to do with the assets of the testator at all, and they can only get at them by the circuitous process of the executors being indemnified. Now, adjust those rights, and the thing is perfectly plain. Out of the assets of that part of the estate which existed at the death of the testator his creditors come first; the executor has no right of indemnity except as regards debts incurred by himself as executor. Those creditors have nothing to do with the will; as Mr. *Buckley* said, they have nothing to do with what the will says about carrying on the business or anything else. They ask for payment out of the assets of the testator and they get it. When you come to other assets, then, as I say, a distinction must be drawn; whereas they claim the assets of the testator free from all rights of the executors to be indemnified, they cannot claim the subsequently acquired assets except subject to the rights of

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the executors to indemnity. That is worked out by the variations in the order which Lord Justice *Cotton* has suggested, and which we propose to make.

I cannot help thinking there has been some confusion created by the case of *In re Evans* (1), which was a very easy case. *In re Evans* does not really throw any light on this case one way or the other. The subsequent creditors there sought to obtain some casks of cement without issuing a *fi. fa.*, claiming a sort of unpaid vendor's lien after delivery of possession had been made. It was a hopeless case, and it has nothing to do with the present.

LOPES, L.J. :—

I am of the same opinion.

Solicitors : *Horne & Birkett*, agents for *T. Chorlton, Manchester ; Rowcliffes, Rawle & Co.*, agents for *Welsh & Sons, Manchester ; Rowley, Page, & Rowley.*

M. W.

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DE MORA *v.* CONCHA.

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Feb. 9, 11, 12, 13, 14, 15.

[1860. D. 101.]

Practice—Evidence of Foreign Law—Actio personalis moritur cum personâ.

In our Courts foreign law is a matter of fact to be decided on the evidence of advocates practising in the Courts of the country whose law is to be ascertained, but if the witnesses in their evidence refer to any passages in the Code of their country, as containing the law applicable to the case, the Court is at liberty to look at those passages and consider what is their proper meaning.

According to the law of *Peru* a father is entitled to administer the estate of his infant child, and to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold (as it was alleged, improperly) a part of her property for much less than it proved to be worth. After his death the daughter claimed compensation out of his estate for the loss occasioned by this disadvantageous sale :—

Held, that the father stood in such a fiduciary position towards the

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(1) 34 Ch. D. 597.

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daughter that the rule "*actio personalis moritur cum personâ*" did not apply to the demand, and that, as the sale had been made without justification, the father's estate must account for the amount which would have been received from the property had it been retained in specie.

MARIA CONCHA, the wife of *Juan José Concha*, a domiciled Chilian, died in 1853. There was one child of the marriage, *Adelinda Concha*, born in 1840, who on the 12th of June, 1855, intermarried with her uncle, *Ramon Concha*.

According to the law of *Peru* and *Chili*, upon the death of *Maria Concha* one half of the *gananciales*, or property acquired by either husband or wife during the marriage, devolved upon *Adelinda*. After the marriage of *Adelinda* her husband *Ramon* commenced an action in *England* against *Juan José Concha* in respect of certain bonds which had been sent to *England* and formed part of the *gananciales*. In February, 1860, *Juan José Concha* died, and a long and complicated litigation ensued, an outline of which will be found in *De Mora* v. *Concha* (1).

At the time of the death of *Maria Concha* in 1853 the *gananciales* consisted (*inter alia*) of thirty-seven Peruvian consolidated bonds of the nominal value of 295,500 pesos in the whole. These bonds came into the hands of *Lazarte*, an agent of *Juan José Concha*, and were all sold by *Juan José Concha's* directions in 1855, shortly before the marriage of *Adelinda*. The proceeds of sale amounted to 62,000 pesos (£12,400).

Ramon Concha having died, *Adelinda* in September, 1872, married *Manuel Antonio Concha*.

On the 26th of October, 1886, an order was made directing that, in addition to the inquiries directed by certain previous orders, an inquiry should be made whether *Juan José Concha* was by the law of *Peru* (which is also the law of *Chili*) entitled to sell any and what part of the 295,500 Peruvian consolidated bonds, and whether any and, if any, what compensation was due from his estate in respect of such sale.

While *Adelinda Concha* was a minor unmarried, her father, according to the law of *Peru*, was administrator of her property. If the sale was justified by his powers as administrator, his estate was only chargeable with the moneys he received from the sale;

(1) 29 Ch. D. 263.

if he had no right to sell, then his estate was chargeable with the loss occasioned to *Adelinda* by the sale, which was very considerable, bonds of that description having subsequently risen in value. The case was also made by the representative of *Juan José Concha* that, after the marriage, which took place when *Adelinda Concha* was of the age of fifteen, her husband, *Ramon Concha*, had ratified the dealings with the bonds.

The Chief Clerk by his certificate, dated the 24th of April, 1888, certified in answer to the above inquiry that *Juan José Concha* was by the law of *Peru* entitled to sell one half, and no more, of the bonds, and that £29,476, being the value of half of the bonds at 99¾ per cent., being the highest rate at which the Peruvian government had paid off its bonds, became due from *Juan José Concha's* estate to *Adelinda Concha* by way of compensation with interest from the 12th of June, 1855.

The residuary legatee of *Juan José Concha* applied to vary this certificate by finding that there was not sufficient evidence to shew that *Juan José Concha* was not, under the circumstances, entitled by the law of *Peru* to sell the whole of the bonds; and by finding that the dealings with the bonds had been ratified by *Ramon Concha* and *Adelinda Concha*, and that she was only entitled to half the amount of the purchase-money with interest. He also applied to vary the certificate as to its findings in answer to other inquiries.

The evidence relied on as to Peruvian law consisted of two affidavits, one by *Zevallos*, sworn in February, 1885, and the other by *Perla*, sworn in November, 1886.

Zevallos in paragraph 3 of his affidavit stated as follows:—

"In the first place, upon the decease of a legitimate mother leaving an infant child, the partnership property belongs in common in equal moieties to the surviving father and to the said infant child as heir of its mother by virtue of art. 1049 of the Civil Code. In the second place the father possesses the paternal right, or *patria potestas*, of administrating the property of his children (art. 287 Civil Code). In the third place, the father, by virtue of arts. 287, 297, and 1099 of the Civil Code, possesses the rights and is subject to all the duties and responsibilities of an ordinary usufructuary as regards his child's fortune,

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excepting only the liability to give security. The father, therefore, holds a threefold position in regard to the said partnership property on the death of a mother leaving an infant child, namely, (1) he possesses half of it absolutely in his own right; (2) he possesses the paternal right (not the right of a guardian) to administer the other half on behalf of his infant child; and (3) he possesses the usufruct in his child's half during its infancy." In paragraph 4 he said: "By virtue of art. 288 of the Civil Code all paternal rights over the property of such child would cease on its marriage, when (if a female) the right to administer such property would by virtue of art. 180 vest in her husband, who thus becomes thereupon a person entitled under art. 2136 to require on behalf of his wife a formal inventory and partition to be made by the proper officers, and in the manner appointed for the purpose by the Code of Procedure, of the partnership property of her parents in a moiety of which she is interested. But if such husband, knowing that the property of his said wife consists principally, if not entirely, of such things as shares and so forth, as defined in art. 454, receives informal information of the said property from his wife's father for the said husband's satisfaction, it would be perfectly competent for him as administrator of his wife's property to accept or acquiesce in such informal statement, and all responsibility on the part of the father would be thereby determined." In paragraph 5 he said: "A father, by art. 287 of the Civil Code, has the paternal right of administering the property of his infant child, but as he also enjoys the usufruct of such property, he is by art. 295 subjected to the like obligations and restrictions as other usufructuaries. These obligations and restrictions are contained in arts. 1082 and 1098 of the Civil Code, but with the single exception hereinafter mentioned these restrictions and obligations contained in these articles refer solely to moveable property, under which denomination, as I have above stated, are only included (art. 457) household effects, and not money or credits, to which latter therefore the said obligations and restrictions do not apply. Now it is provided by art. 3 of the Civil Code that 'an act can be denied to no one which is not prohibited by law.' Hence the act of changing the investments of money and credits forming the

property of his infant child cannot be denied to a father who possesses the right to administer such property. Such acts are included in the meaning of the word *administracion* in the Spanish language, and are invariably so adopted by the Peruvian Courts of law. Art. 1098 of the Civil Code provides what are the obligations and restrictions under which the father, being also usufructuary, should administer the property of his infant child (that is to say) 'he will use the same as a good father of a family,' which means that, either in permitting investments to remain, or in realizing the same and holding the proceeds uninvested, or in making reinvestments, or in dealing generally with the property in question, he is only bound to exercise his best discretion, abilities and judgment, free from fraud or favour or *mala fides*, which conditions being observed absolve him from further responsibility to any person whatsoever for loss or other consequence arising to the funds or property in question, and the persons ultimately entitled to the reversion in such funds or property must succeed to the invested or uninvested property, subject to any gains or losses which may have been caused by the father usufructuary using the same to the best of his ability as a good father of a family."

Perla, on the other hand, deposed that "*Donna Adelinda Concha's* right to the last-mentioned half was not that of a creditor of her father but was the right to have that half delivered to her in the same things whereof it consisted, she, on the death of her mother, becoming owner of the *gananciales* of the latter of whatsoever property they might consist, so that if on the death of *Donna Maria Concha* the common *gananciales* were invested in bonds, public funds, or otherwise, a moiety of each one of such bonds, and a moiety of such funds, and a moiety of each other item of such other property would specifically belong to *Donna Adelinda Concha*, as owner of a moiety of the common *gananciales*."

"During the period between those two dates" (the death of the mother and the marriage of *Adelinda*), "the said *Juan J. Concha* was entitled to administer the share of the *gananciales* that pertained to her subject to his preserving it in the same condition in which he received it, and enjoying the income to his own use so long as he did not waste the capital, in which

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case he would lose both the right to administer and to appropriate the income to himself (Civil Code, art. 287, 6th clause and 292). The parent who administers the property of his children is subject to the obligations of the usufructuary, and cannot in any way whatever alienate, mortgage, pledge or incumber the thing subjected to the usufruct (Civil Code, art. 1095), unless with the sanction of a Court of competent jurisdiction, only given when such proposed dealing is for the benefit of the minor. A usufructuary would, however, be able to dispose of things *quo usu consumitur*, which definition would include cash or goods bought to sell again, but it would not include public funds or bonds." He went on to say that suppose a bond for 1000 pesos, part of *Adelinda's* shares in the *gananciales*, had been sold by *J. J. Concha* before June, 1855, she would be entitled to demand from him, if living, and from his estate, if dead, the return of the bond itself or a bond of equal amount and of the same issue, or at her option the value in money attaching to such bond at the date at which the money was actually paid to her, with such interest as therein mentioned. He referred in a schedule to such provisions of the Code as he considered material to the questions.

Mr. Justice *Stirling* said that the evidence was not in a satisfactory state, but attached greater weight to the affidavit of *Zevallos* than to that of *Perla*, and varied the certificate in answer to the inquiry of 1886 in manner proposed by the residuary legatee. The question whether the Court could look at the provisions of the Code for itself was not raised before him.

Adelinda Concha and her husband appealed.

Rigby, Q.C., *Fischer*, Q.C., and *Stewart-Smith*, for the Appellant:—

The sections of the Code to which the witnesses refer support the view taken by *Perla*, and shew that the conclusions drawn from the affidavits of *Zevallos* are erroneous.

Brice, Q.C., and *Woodfall*, for the Respondent:—

The Court cannot look to the sections of the Peruvian Code set out in the schedules to the affidavits, but is confined to the

law as stated by the expert in the body of the affidavit: Lord *Brougham* in *Sussex Peerage Case* (1). If the witnesses do not in their evidence incorporate or verify the law supposed to be established by sections of the Code those sections cannot be looked at: *Earl Nelson* v. *Lord Bridport* (2).

[THE COURT held that the sections of the Code to which the witnesses referred could be looked to, and the argument proceed on that footing.]

Brice, Q.C., and *Woodfall*, for the Respondent:—

The sale of the bonds took place between February and June, 1855. The testator died in February, 1860. No claim was made against him in respect of the sale during his lifetime. It cannot now be made: *actio personalis*, *&c.* The claim is for damages for wrongful sale, *i.e.*, a tort. *Adelinda* is entitled only to the proceeds of the sale, £6200. *Perla* states her rights according to the law of *Peru*.

[LINDLEY, L.J.:—Does not the Peruvian law apply?]

No; *England* is the forum of administration: *Phillips* v. *Eyre* (3).

[COTTON, L.J.:—Is this not a case of trust?]

No; it falls within the principle on which the second inquiry in *Phillips* v. *Homfray* (4) was directed to be stayed.

[LINDLEY, L.J.:—The father commits a breach of duty and you ask us to treat him as a trespasser.

LOPES, L.J.:—Is he not a bailee?]

An action in assumpsit could only be maintained for the proceeds of the property received. Rents received under a mistake could not be recovered although the receiver was in fact a trespasser: *Monypenny* v. *Bristow* (5).

Rigby, in reply.

(1) 11 Cl. & F. 115.
(2) 8 Beav. 527.
(3) Law Rep. 6 Q. B. 1.
(4) 24 Ch. D. 439.
(5) 2 Russ. & My. 117.

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COTTON, L.J., after shortly referring to the nature of the litigation which had taken place, and stating that the question which had arisen was as to the rights of *Adelinda Concha* in respect of the property held in common by her father and mother, to one moiety of which she on the death of her mother became entitled, her father being entitled to the other moiety, proceeded as follows:—

The question is what were the rights of *Adelinda Concha* and her father in respect of this property according to the law of *Peru*. Before going into that question, the discussion which has taken place makes it desirable to consider shortly how an English Court is to decide a question of foreign law. In our Courts foreign law is a matter of fact to be decided on evidence, and the proper evidence is that of experts, that is to say, of advocates practising in the Courts of the country whose law our Courts want to ascertain. It was urged on behalf of the Respondent that all we can do is to look at the affidavits of the experts, and that if the law on any particular point is not laid down in them, then we have no evidence what the foreign law on that point is, and that then, if the Appellant's case depends on the law on that particular point, she has not established it, and her appeal must fail. Now, as I have said, the proper evidence of the law of any foreign country is evidence by lawyers of that country, but if in their evidence they refer to passages in the Code of the country whose law we are endeavouring to ascertain, it would, as it appears to me, be most unreasonable to hold that we are not at liberty to look at those passages and consider what is their proper meaning. The case of *Bremer* v. *Freeman* (1) lays down a rule as to dealing with evidence of foreign law which goes further than we are asked to go here. The Privy Council in that case was not sitting as a Court of foreign law, as in cases of appeals from a colony in which a foreign law prevails; the appeal was from the decision of the Prerogative Court on the question whether a will was admissible to probate. The Judges said that the evidence of the experts was not satisfactory, and they laid down a rule which is correctly stated in the marginal note: "Foreign law is a matter of fact to be ascertained by the evi-

(1) 10 Moo. P. C. 306.

dence of experts skilled in such law; but where the evidence of the experts is unsatisfactory and conflicting, the Appellate Court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign Courts and the text-writers, in order to arrive at a satisfactory conclusion upon the question of foreign law." The Privy Council there examined decisions of the foreign Courts, which to them were merely evidence of matters of fact, *à fortiori* may we refer to the provisions of the Code to which both witnesses refer in support of their opinions.

We have here only two witnesses, *Zevallos* and *Perla*. I should be sorry to say anything wanting in courtesy to *Zevallos*, but if the two come into conflict, I cannot but attach greater weight to the evidence of *Perla*, and that for several reasons. One is that *Zevallos*, though when he was cross-examined he asked to be cross-examined in French rather than English, has made his affidavit in English, and we cannot rely on it as we should upon an affidavit made in his own language and translated by a person sworn to give a correct translation. Then, again, at the time when the affidavit of *Zevallos* was filed the present question had not arisen. The question then before the Court was whether *Juan José Concha* was not to be charged in a particular way in consequence of his having failed in his duty to make an inventory of the common property of himself and his deceased wife. What *Zevallos* says in the 4th paragraph of his affidavit has been relied on as shewing that *Ramon Concha* by accepting "informal information" of what the common property was released *Juan José Concha* from all liability in respect of his dealings with it. But, in my opinion, it would be contrary to various provisions of the Code to which *Perla* refers to hold that the husband could thus gave up his wife's property, and I think that the statement of *Zevallos* is to be explained by supposing that he meant only to say that *Ramon Concha* released *Juan José Concha* from any liability incurred by not making a formal inventory. [His Lordship then adverted to an instance in which *Zevallos* had made a clear mistake as to which provision of the Code applied to the point with which he was dealing.]

We have to consider whether *Juan José Concha* had power to

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deal as he did with the common property, and what were the rights and powers of *Ramon Concha*, as husband of *Adelinda*, against that property.

With regard to the powers of a husband, the material clauses of the Code are: "Art. 180. The husband is the administrator of the property of the conjugal copartnership." "Art. 955. There results from marriage a legal copartnership between husband and wife in which there may be private property of each consort, and property common to the consorts. The husband is the administrator of these properties according to arts. 180 and 181." As to the power of a father: "Art. 287. Right of *patria potestas* are . . . (5) to administer the property of the children; (6) to appropriate to themselves the income of the property of their children who are minors so long as the *patria potestas* should last . . . ." "Art. 288. *Patria potestas* is determined by the marriage of the child." "Art. 295. Parents who administer the property of their children are subject to the same obligations as the usufructuary." 'Art. 1082. Usufruct is the right of using and enjoying the property of another, preserving the substance of it." "Art. 1090. If the usufruct comprises things that cannot be used without consuming them the usufructuary has power to avail himself thereof, with the obligation of paying for them or returning others of the like quantity and quality when the usufruct may terminate." "Art. 1095. The usufructuary may transmit his right to use and enjoy by any of the means the law recognizes, but he cannot alienate, nor hypothecate, nor pledge, nor incumber in any way the thing subject to the usufruct." "Art. 1098. The usufructuary takes things in the state in which they may be, but before entering on the enjoyment of them he must in the presence of the proprietor, or with notice to him, inventory all the moveable property subject to the usufruct, and give security to use the same as a good father of a family, and that he will restore them at the termination of the usufruct." "Art. 1099. Parents who have the usufruct of the property of their children are not obliged to give security."

There is a contest how far the acts of *Juan José Concha* come within administering the property. Now, property which comes into the partnership is *primâ facie* to be administered for the

purposes of that partnership. A husband may administer the property of his wife, a father that of his child, but cannot apply that property for his own private purposes, or purposes not connected with a due administration of the property. If he claims to do so, the burden is thrown on him to prove that he has a right to do it, and arts. 295 and 1095 shew that the mere right of administering does not give such a power. A *bonâ fide* sale for the purpose of reinvestment might well come within the powers of the administrator; but if an act is done not for the purposes of the fund in respect of which it is done, that act cannot, in my opinion, having regard to the Code and the evidence, be treated as an act done in the due course of administration.

[His Lordship then considered the circumstances under which the bonds were sold, and stated his conclusion upon the evidence to be that they were sold not for the purpose of furthering the objects of the community, and keeping the common property in safety or better invested, but simply to discharge the private obligations of *Juan José Concha*, and that according to Peruvian law he would be liable as if he had the bonds still in his hands.]

It was urged upon us that to allow this claim would be contrary to the maxim of English law, "*Actio personalis moritur cum personâ.*" It is true that no action for a tort can be revived or commenced against the representatives of the person who committed it; but the case is quite different where the act is not a mere tort, but is a breach of a *quasi* contract, where the claim is founded on breach of a fiduciary relation, or on failure to perform a duty. Here the father, though I do not call him a trustee, was in a position in which he owed duties of a fiduciary character to his daughter. In the very careful judgment of Lord Justice *Bowen* in *Phillips* v. *Homfray* (1), cases depending on breach of contract, express or implied, are excepted from the judgment. Here there is what we call *quasi* contract, the law implying a contract that a man will faithfully perform the duties which he has undertaken. *Juan José Concha* undertook a duty in consequence of his position, and losses arising from his breach of it can be followed up against his estate.

(1) 24 Ch. D. 439.

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[His Lordship then proceeded to consider the principle on which the Chief Clerk had gone as to the amount with which the estate of *Juan José Concha* was to be charged, and held that the finding of the Chief Clerk ought to be restored.]

LINDLEY, L.J.:—

I have nothing to add. We have considered this case together and separately, and I entirely concur in the judgment pronounced by the Lord Justice.

LOPES, L.J.:—

I desire only to make an observation on a question of evidence which arose in this case.

It was said that the Court could not look at the provisions of the Civil Code of *Peru*, and form any opinion as to the meaning of any of its provisions.

I believe the rule in such a case to be that if an expert witness called to prove foreign law states that any text-book, decision, code, or other legal document, truly represents that law, then the Court is at liberty to regard the legal document to which he refers, not as evidence *per se*, but as part of the testimony of the witness, and to deal with it, and give the same effect to it, as to any other portion of the evidence of the expert witness.

Solicitors: *Worthington Evans*; *H. L. Pemberton.*

H. C. J.

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C. A. 1889 Feb. 27.

[1888 W. 823.]

Practice—Reference to Referee—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 56 [*Revised Ed. Statutes, vol. xvii. p.* 86].

The power given by the *Judicature Act*, 1873, s. 56, to refer "any question arising in any cause or matter" to an Official or Special Referee applies only to questions which must necessarily be decided in the cause or matter, and not to questions which it may prove unnecessary to decide.

Such reference may be directed before the trial.

The Plaintiff sued for rescission of a contract of partnership between him and the Defendant, and for damages, on the ground that he had entered into the partnership on the faith of false representations made by the Defendant as to the amount of his professional income. The Defendant by his defence denied having made any positive statement as to the amount of the income, and stated that the Plaintiff had for months before the partnership was entered into attended at his office as clerk, and had full access to the books, and that the Plaintiff had expressed himself satisfied with the business. It further appeared that the Plaintiff had continued for nearly four years in the partnership, which was then dissolved by agreement, and that he had never complained to the Defendant of misrepresentation. Mr. Justice *North*, in Chambers, after notice of trial, ordered, on the application of the Plaintiff, a reference as to the amount of the Defendant's profits for the six years immediately preceding the partnership:—

Held, by the Court of Appeal, that as the question what the Defendant's profits were would be immaterial unless it was established that the Defendant had made a positive statement as to their amount, and that the Plaintiff had entered into the partnership in reliance on such statement, and that the Plaintiff had not by his conduct lost the right to complain of misrepresentation, the question referred was one which might never arise, and that the reference ought to be discharged.

THIS action was brought to have articles of partnership between the Plaintiff and the Defendant, who were solicitors, rescinded on the ground of misrepresentation by the Defendant of the value of his practice, and to recover damages for the misrepresentation, and in the alternative to have the affairs of the partnership wound up.

The statement of claim alleged that the partnership commenced on the 1st of January, 1884, though the articles were not signed till the 14th of February, 1885. The Plaintiff alleged

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that he entered into partnership with the Defendant upon the faith of representations both verbally and in writing made by the Defendant to the Plaintiff, which representations the Plaintiff believed to be true, that the Defendant's practice was worth £2000 a year and would increase. The Plaintiff alleged that these representations were untrue, and that the Defendant knew when he made them that they were untrue, or made them recklessly and without caring whether they were true or false.

The articles provided that the Defendant should have three-fourths of the profits and the Plaintiff one-fourth for thirteen years, after which the shares were to be two-thirds and one-third. Any excess above £2000 was to be divided equally.

The partnership was dissolved by agreement on the 31st of December, 1887.

The Defendant by his defence denied having made any representations verbally or in writing as to the amount of his profits except by a letter, dated the 1st of August, 1883, which he set out, and in which he said, "My practice may be considered worth £2000 a year, and it will increase probably—certainly, I may say, on the death of a namesake now 75." He stated that the partnership commenced in April, 1884, though it was agreed that it should be deemed to have commenced on the 1st of January, 1884. He further stated that from October, 1883, till the partnership was entered into, the Plaintiff acted as clerk to him, attended regularly at the Defendant's offices, had a full insight into the business, had access to all the books and papers and every means of acquiring complete information as to the business past and present, and in April, 1884, expressed himself quite satisfied with the business.

Notice of trial was given in July, 1888.

It appeared from the answer of the Defendant, filed in October, 1888, to interrogatories exhibited by the Plaintiff, that the Defendant had kept no books, and that it would be a difficult matter to ascertain the amount of his profits. The Defendant said he made the statement as to their being about £2000 from his general knowledge of the amount and nature of the business he was transacting, and of the amount he received. He declined to answer how much he received during each of the six years

immediately preceding the year 1883, on the ground that it was not material to the issue in the action.

The Plaintiff by his answer to interrogatories said that he could not state the date when he first discovered that the Defendant's business was not worth £2000 a year. He went on to say, "From the fact that my share of the profits was apparently so small, and that the Defendant would never come to any settlement of accounts, and from my observations of the nature and extent of the Defendant's business, I drew the inference that the Defendant's business was not worth £2000 a year. Save as appears by the proceedings in this action I never communicated such inference to the Defendant."

In January, 1889, the Plaintiff took out a summons asking that certain accounts and inquiries might be directed, and the trial stayed till after the filing of the certificate or report.

On the 7th of February Mr. Justice *North* in Chambers made an order "that the following question arising in this action (that is to say) what was the net profit of the Defendant's practice during each of the six years, 1878 to 1883, both inclusive, after deducting all payments and rent, clerks' salaries, and other office expenses, and making all other proper allowances, be referred to the Official Referee in rotation under sect. 56 of the *Supreme Court of Judicature Act*, 1873." Liberty to amend the pleadings was given, and further proceedings were stayed till after the report.

The Defendant appealed.

Crackanthorpe, Q.C., and *H. Terrell*, for the Appellant:—

We say (1) that this inquiry is not appropriate in form; (2) that it ought not to be directed at present. In cases of fraud verbal representations must be alleged and proved. The Plaintiff alleges representations verbal and oral to the same effect; and what representations were made must be judged by the written representation—the letter of the 1st of August, 1883. That letter is not positive as to the amount of profits; it only says that the practice "may be considered worth £2000 a year." Mr. Justice *North* seems to have treated this as a positive representation that the profits amounted to £2000 a year. That we say is not its true construction. The Plaintiff must make out

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that his construction of the representation is the true one, and that he relied upon it. Now there is a *primâ facie* case that he did not rely upon it, but upon his knowledge of the business derived from his taking part in it, which he did for a long period before he signed the articles. We contend further that a reference of this kind ought only to be directed at the trial.

Cozens-Hardy, Q.C., and *Beddall*, for the Plaintiff:—

The letter, according to its reasonable construction, states the profits to be £2000 a year, and the articles proceed on the basis of £2000 a year.

[COTTON, L.J.:—It appears to me that, before inquiring whether the representation was true, the question has to be tried whether the Plaintiff is in a position to avail himself of any misrepresentation. He went on for several years without making any complaint of untrue representations.]

Delay of that kind may be an answer to the case for rescinding, but it is none to the claim for damages. There will be a great saving of time and expense in having this question decided separately. The Judge said that he could not try in Court this question as to the amount of profits, yet, unless it is tried separately, we must come prepared with witnesses at the great risk of the Judge referring the question at the trial.

[LOPES, L.J.:—Is there any precedent for referring an action for deceit?]

The Judge has not done so, he has only referred a question of figures which he thought could be best tried in this way.

[LOPES, L.J.:—Can a reference of this kind be made except by the Judge at the trial?]

Longman v. *East* (1), where sects. 56 and 57 were much discussed, tends to shew that it can. Here, if the misstatement is proved, it avoids the contract: *Redgrave* v. *Hurd* (2). The way in which a case shall be tried is eminently a matter within the discretion of the Judge who has to try it, and the Court will be slow to interfere with the exercise of that discretion.

(1) 3 C. P. D. 142. (2) 20 Ch. D. 1.

Crackanthorpe, in reply:—

[COTTON, L.J.:—Do you say that there is no jurisdiction to direct an inquiry under sect. 56 at this stage? If there is jurisdiction we should be slow to interfere with the discretion of the Judge.]

I do not dispute the jurisdiction of the Judge to direct a reference under sect. 56 before the trial, but I dispute his jurisdiction to direct this reference. I contend that under that section nothing can be referred before the trial except questions which must necessarily have to be determined. Now here it may not be necessary to shew whether the profits were more or less than £2000 a year, for it is wholly immaterial what they were unless the Plaintiff can shew (1), that the Defendant represented them to amount to that sum; (2), that the Plaintiff entered into the partnership on the faith of that representation, and (3), that he has not so conducted himself as to debar him from complaining of misrepresentation.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *North* referring a question to the Official Referee before the trial of the action. If the matter was within the discretion of the learned Judge I should not interfere with that discretion, because the Judge by whom the action is to be tried must be the most proper person to decide what course should be taken in bringing that action to trial. But was it within his discretion to make this order of reference under the *Judicature Act*, 1873, sect. 56? The action is an action to set aside a contract of partnership or to obtain damages for misrepresentation made by the Defendant as to the profits of the business before that contract was entered into. The Plaintiff alleges that there was a representation made by the Defendant as to the profits of the business, under such circumstances that, if that statement was not true, the Plaintiff is entitled to damages, and is also entitled to set aside the contract. The reference is a reference for the purpose of ascertaining what the profits of the Defendant's business were, a point which may

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arise at the trial of the action. But is that the object of sect. 56? Mr. *Crackanthorpe* contends that the section only authorizes a reference as to an issue which must in any event be decided in the action. For instance, if the plaintiff sues in respect of obstruction of light and air, then unless the defendant sets up some case which would preclude the plaintiff from complaining of an obstruction of light and air, the question whether the light has been really obstructed must necessarily be decided in the action, and it might under certain circumstances be desirable that a reference of the question whether it had been obstructed should be ordered, in order that a report might be made to the Judge to enable him better to decide that question. I see no reason to doubt that such an order may be made at any stage in the action, if the question is one which must necessarily arise, and must certainly be decided. If, indeed, it was alleged by the defendant that supposing he may have obstructed the light, the terms of an agreement which had been entered into by the plaintiff prevent the plaintiff from raising the question, then I should say that the question whether there was an agreement having the effect contended for ought to be decided first. Now, here, will the question what was the amount of the profits of the Defendant's business necessarily arise in this action? I think not. It may arise, but I think it not improbable that the Defendant may establish that the Plaintiff has by his conduct precluded himself from claiming damages or rescission of the contract.

Sect. 56 is in these terms: "Subject to any rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) . . . may be referred by the Court, or by any Divisional Court or Judge before whom such cause or matter may be pending, for inquiry and report." I think the proper construction of that enactment is that suggested by Mr. *Crackanthorpe*, that it only refers to issues which must necessarily arise in the action, and not to issues which will not arise unless the Plaintiff is successful on other issues. I think, therefore, that it was wrong to make any such reference as has been directed, and the order will be discharged.

LINDLEY, L.J.:—

In order to appreciate this controversy it is necessary to bear in mind what is in dispute. The learned Judge, no doubt with a view to save expense and trouble, has made this order: "That the following question arising in this action, that is to say, what was the net profit of the Defendant's practice during each of the six years from 1878 to 1883, both inclusive, after deducting all payments and rent, clerks' salaries, and other office expenses, and making all other proper allowances, be referred for inquiry and report to the Official Referee in rotation under sect. 56 of the *Supreme Court of Judicature Act*, 1873," and then it is ordered that all further proceedings in the action be stayed until twenty-one days after the report. That is rather a formidable order, and we have to consider whether it is one which the learned Judge could make, and even if he could, whether it was one which he ought to make. The first point is to see under what section such an order could be made, and we are referred to the *Judicature Act*, 1873, s. 56. We have then to consider whether the question which is here referred is a question arising in this action. I certainly am not disposed to be the first to construe that section very restrictively, and to say that no reference can be made before the trial. I do not think the section can be so construed, and it appears to me that in proper cases references may be made before the trial. But if so, I have no hesitation in saying that the questions to be referred, if they have not already arisen, must be such as are certain to arise, otherwise this section will be used for purposes wholly different from those for which it was introduced. Now is it certain that the question here referred will ever be a question in the action? I not only think that it is by no means certain that it will, but I have a very strong impression that it will not, that is to say, having regard to the construction of the letter of the 1st of August, 1883, to the conduct of the Plaintiff, and to what he admits, I doubt very much whether it will ever have to be ascertained what the profits of the Defendant's business actually were.

Under these circumstances I think the order ought never to have been made, and I do not think that Mr. Justice *North* would

C. A. 1889 WEED v. WARD.

have made it if he had had the advantage of hearing the arguments which we have heard to-day.

LOPES, L.J.:—

Sect. 56 of the *Judicature Act*, 1873, gives a large discretion with regard to the references contemplated by it, and I should be very unwilling unduly to limit or curtail that discretion, but the section must be carefully looked at to see in respect of what this discretion is to be exercised. It is to be exercised in respect of "any question arising in any cause or matter." I think the meaning of that is any question which must necessarily arise, because if it had any wider interpretation than that it seems to me that this section might be made an instrument of torture to litigants, and might be used for the purpose of obtaining from them information to which the party endeavouring to obtain it had no right. The question therefore in this case is whether the question what was the amount of the profits of the Defendant's business is a question necessarily arising in the action? It appears to me that it is not—it is a question which may or may not arise. It cannot possibly arise unless the Plaintiff establishes that he relied on the alleged representation in the sense he now attributes to it. It appears to me, therefore, that if we were to allow this order to stand, the result of it would be a very expensive and long inquiry which might prove to be of no use.

I am of opinion, therefore, that this appeal ought to be allowed.

Solicitors: *Nye, Greenwood & Moreton; F. FitzPayne.*

H. C. J.

MARSH *v.* JONES.

C. A.
1889
Feb. 27.

[1888 M. 30.]

Vendor and Purchaser—Contract to purchase at a Valuation—Interest—Damages.

The Defendant agreed with the Plaintiff, his tenant of a mill, to purchase at a proper valuation at the expiration of the tenancy some machinery which the Plaintiff was setting up in the mill, nothing being said about interest on the purchase-money. The tenancy expired at Michaelmas, 1885. The Defendant refused to purchase the machinery, and in February, 1887, the Plaintiff commenced an action for specific performance, not specifically mentioning in his statement of claim either interest or damages. The action was dismissed, but in November, 1888, the Court of Appeal reversed this decision and gave a judgment directing a reference to an official referee to ascertain the value, and ordering the Defendant to pay it when ascertained. The question as to interest was not raised. The Plaintiff applied to vary the minutes by directing the Defendant to pay the value with interest from Michaelmas, 1885. The Court made the order for payment of interest only from the referee's report, and declined to decide anything further on that application, but gave leave to the Plaintiff if so advised to apply after the report for payment of prior interest. The report was made in February, 1889, and the Plaintiff then applied to the Court to order interest from Michaelmas, 1885:—

Held, that the Plaintiff was entitled, by way of damages for delay, to interest at £4 per cent. on the amount of the valuation from Lady Day, 1886, on which day the Defendant had taken possession, the Plaintiff having up to that time remained in possession rent free as caretaker.

By lease of the 20th of September, 1870, *W. E. Jones* demised a flour mill to the Plaintiff for twenty-one years from the 29th of September, 1870, with power to the Plaintiff to determine the lease at the end of the first five years or any subsequent period of five years of the term. The Plaintiff was to be at liberty at the expiration of the term of the demise to remove any erections placed by him on the premises, first giving the reversioner the option of purchasing them at a fair valuation.

The Defendant had become entitled to the reversion.

In 1882 negotiations by letter took place between the Plaintiff and the Defendant's agent as to repairs and renewals of the machinery. The Defendant through the agent agreed to provide some new millstones, and also to purchase at a proper

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valuation at the expiration of the tenancy the new machinery which the Plaintiff was then erecting.

On the 29th of September, 1885, the lease came to an end under notice given by the Plaintiff. The Plaintiff, however, remained in possession as caretaker till Lady Day, 1886, rent free.

Shortly after the determination of the tenancy the Plaintiff and Defendant appointed valuers to value the machinery. The Plaintiff's valuer valued it at £2376, and the Defendant's valuer at £2258. Disputes arose as to the valuation, and ultimately the Defendant refused to complete the purchase. On the 24th of February, 1887, the Plaintiff commenced this action, asking for specific performance of the agreement to purchase at a valuation, and offering to accept the price fixed by the Defendant's valuer. The statement of claim asked for payment of the £2258 or such other sum as the Court should think proper, but said nothing about interest or damages.

On the 4th of May, 1888, Mr. Justice *Kekewich* dismissed the action, being of opinion that the Defendant's agent, through whom the agreement of 1882 had been effected, had not authority to bind the Defendant to purchase. The Plaintiff appealed. The Defendant insisted that his agent had not authority to bind him, and that if he had, the contract applied only to expiration of the tenancy by effluxion of time. The Court of Appeal was in favour of the Plaintiff on both points, and on the 2nd of November, 1888, gave judgment reversing the judgment below, and ordering specific performance, with a reference to the official referee to ascertain the price. The question of interest on the price was not raised.

On the 5th of December, 1888, the Plaintiff applied to the Court of Appeal to vary the minutes by inserting a direction that the Defendant should pay the amount of the value to be ascertained with interest at £4 per cent. from the 29th of September, 1885 (the determination of the tenancy). The Court declined to deal with this question on an application to vary minutes, and directed payment of interest only from the time of the referee's report, but gave the Plaintiff liberty (if so advised) to make an application for interest from an earlier date after the referee had made his report.

On the 11th of February, 1889, the official referee made his report, valuing the machinery at £2000. On the 23rd of February the Plaintiff gave notice of motion before the Court of Appeal that the Defendant might be ordered to pay to the Plaintiff interest at £4 per cent. per annum on the £2000 from the 29th of September, 1885, to the 11th of February, 1889.

Beale, Q.C., and *Lees Knowles*, for the motion:—

The case comes within the ordinary rule in cases of specific performance that a purchaser in possession must pay interest. The Respondents may refer to *Catling* v. *Great Northern Railway Company* (1), but it does not apply, for in that case possession had not been taken. The present case is governed by the principle of *In re Pigott and Great Western Railway Company* (2). *In re Shaw and Corporation of Birmingham* (3) also supports our case. There is one authority to a like effect where the price of machinery was involved: *Carrodus* v. *Sharp* (4).

P. Stokes, for the Defendant:—

The pleadings do not raise any case for interest or damages. The application ought to be refused as too late, for the point ought to have been raised on the hearing of the appeal. But taking the case on the merits, the contract says nothing about interest, though the parties must have contemplated some interval between the termination of the lease and the ascertainment of the purchase-money. *Catling* v. *Great Northern Railway Company* lays down the principle that the relation of vendor and purchaser does not exist between the parties till the purchase-money has been ascertained, so on the ordinary principles applicable to specific performance interest cannot be given. The interest, if given at all, can only be given by way of damages, so the applicant is trying to import for the first time into the action, after the appeal has been heard, a claim for damages. As regards *In re Pigott and Great Western Railway Company* and *In re Shaw and Corporation of Birmingham* they are in my favour,

(1) 18 W. R. 121.
(2) 18 Ch. D. 146.
(3) 27 Ch. D. 614.
(4) 20 Beav. 56.

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for in neither of them was interest given from a time before the ascertaining the purchase-money.

Beale, in reply:—

In *Rhys* v. *Dare Valley Railway Company* (1) interest was given from the time of taking possession, which was before the price had been ascertained.

COTTON, L.J.:—

This is an application by the Plaintiff for interest on the purchase-money payable to him by his late landlord, the Defendant, for machinery on the demised property, not from the time of the report which ascertained the amount of the purchase-money, but from the time when the landlord took possession of the machinery. If the question of interest depends on the rules as to giving interest in cases of specific performance no amendment of the pleadings is necessary. I think, however, that the case is not one of interest as incidental to specific performance, but of damages. In my opinion the Plaintiff is entitled by way of damages to interest at £4 per cent. from the time when the Defendant took possession, *i.e.*, Lady Day, 1886. The Defendant must pay the costs of the inquiry before the official referee as part of the costs of the suit, but the Plaintiff cannot have any costs of the present motion, which has been rendered necessary by his omitting to raise the point, as he ought to have done, at the hearing of the appeal.

LINDLEY, L.J.:—

I am of the same opinion, and I agree in thinking that this is not the ordinary case of interest in suits for specific performance as between vendor and purchaser. The Plaintiff was tenant of a mill, his fixtures in which the Defendant was bound to buy at a valuation. We have decided that when the tenancy ended the Defendant ought to have bought. He refused to do so, and the result of the litigation is that the official referee has fixed the price at £2000. By our former order we directed the Defendant

(1) Law Rep. 19 Eq. 93.

to pay interest from the time of the report, leaving open the question as to prior interest. According to law, equity, and justice the Defendant ought to pay interest as a compensation to the Plaintiff for the wrongful delay, but he ought not to pay the costs of this motion, which was made necessary by the Plaintiff's omission to raise the question at the hearing of the appeal.

LOPES, L.J. :—

I also consider that what the Plaintiff is asking is damages rather than interest, and that the Defendant ought to have interest by way of damages from the time when the Defendant took possession, viz., Lady Day, 1886. I agree that the Plaintiff ought not to have the costs of this motion, for the claim ought to have been brought forward on the hearing of the appeal.

Solicitors: *Smiles, Benyon, & Ollard,* agents for *Duignan & Elliot, Walsall; W. B. Jones.*

H. C. J.

ARNISON *v.* SMITH.

[1887. A. 1361.]

Practice—Death of one of several Plaintiffs before Judgment—Application by Executors after Judgment to carry on Action against the Defendants — Rules of Supreme Court, 1883, *Order* XVII., *r.* 4.

An action for damages was brought by several Plaintiffs having separate causes of action. Two of the Plaintiffs died before the trial, but no application was made to put off the trial, and judgment was given for the Defendants and the action dismissed. The executors of the deceased Plaintiffs applied under Order XVII., rule 4, for an order to carry on the action against the Defendants :—

Held (affirming the decision of *Kekewich,* J.), that the order ought not to be made: *Cotton,* L.J., holding that the Court had no jurisdiction to make such an order after final judgment: and *Lindley* and *Lopes,* L.JJ., holding that whether the Court had jurisdiction or not, it was not necessary or desirable to make such an order in the present case.

THE action in this case was brought by certain shareholders, fifty-four in number, of the *General Waterworks Company,* against the directors, claiming damages for misrepresentations in the

C. A. 1889 ARNISON v. SMITH.

prospectus of the company whereby they were induced to take shares. The writ was issued in October, 1887, and issue was joined in January, 1888. *Edwards*, one of the Plaintiffs, died on the 28th of November, 1887; another, *Wells*, died on the 17th of July, 1888, but probate of his will was not granted till the 7th of August, 1888.

The action came on for trial before Mr. Justice *Kekewich* on the 3rd of August, 1888, but the solicitor for the Plaintiffs was not aware till after the trial had commenced that either of the Plaintiffs was dead. No application was made to postpone the trial in consequence of the deaths of the Plaintiffs; and the trial proceeded and the Judge dismissed the action with costs.

The executors of the two deceased Plaintiffs afterwards applied to Mr. Justice *Kekewich*, under Order XVII., rules 2, 4, that the executors might be made parties and that the action might be carried on between them and the Defendants.

The Judge refused the application and the executors appealed.

Oswald, for the Appellants:—

The Plaintiffs in this action had all separate causes of action, and the case must be treated as though separate actions had been brought, and the damages ought to be assessed accordingly: *Booth* v. *Briscoe* (1).

[LOPES, L.J.:—Is there any case in which Order XVII., rule 4, has been held to apply after final judgment?]

This judgment was not final as to the deceased Plaintiffs; it was not binding on them. We wish to be put in the same condition as if there had been no trial. If we are not enabled to revive and carry on this action to a fresh trial we shall be estopped by a plea of *res judicata* if we bring a fresh action, and in a case where the period of limitation had nearly run at the time of trial the executors might be barred by a plea of the statute. We should be in a disadvantage in other respects: for in a fresh action we should not be able to make use of the admissions made in this action, some of which are very important. Under the old practice of the Court of Chancery there might

(1) 2 Q. B. D. 496.

have been revivor in a case like this: *Stanhope* v. *Stanhope* (1) If the Court should be against us, there ought to be a declaration that we are not to be barred by a plea of *res judicata*.

Farwell, for the Defendants, was not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, refusing an application by the personal representatives of two Plaintiffs, both of whom died before the trial of the action, for leave, under Order XVII., rule 4, to carry on the proceedings in the action. The difficulty in this case is that the action is at an end, and there are no proceedings pending to which these Plaintiffs were parties before their deaths. Unfortunately, through the solicitor for the Plaintiffs not being made acquainted with the death of these Plaintiffs, he did not ask the Judge, as he might have done, to allow the trial to stand over to enable the personal representatives of the deceased Plaintiffs to be made parties. If this had been done the Judge would probably have granted the application, and a revivor order could have been obtained without difficulty, as the deceased Plaintiffs had a transmissible interest. I use the word "revivor" as a short word expressing the effect of the order that would have been made. Then we come to rule 4 of Order XVII., which is as follows: [His Lordship read the rule.] The application here is not *ex parte*, but is made on notice, but that is immaterial. The question is: Is this action in such a state that it can be carried on "between the continuing and the new parties"? It is said that this action ought to be treated as if it was fifty-four separate actions, and the judgment delivered by Lord Justice *Bramwell* in *Booth* v. *Briscoe* (2) was referred to in support of that contention. But, in my opinion, that judgment, rightly understood, has no bearing upon the present question. As a matter of fact, there were not separate actions in that case, but the plaintiffs had separate causes of action, and the new Rules gave power to persons having separate causes of action to join in one action. Lord *Bramwell* nowhere said in his judgment that there were

(1) 11 P. D. 103, 106. (2) 2 Q. B. D. 496.

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eight separate actions, but that there were eight separate causes of action, and that the plaintiffs might have brought eight separate actions. But they did, in fact, bring one action, and in that action took a judgment for all the plaintiffs for forty shillings damages. If they had properly considered their position, they would have remembered that though there was one action there were eight separate causes of action, and have had the damages severally assessed. Therefore that case does not affect this question, whether there can be an order to revive after final judgment has been given. In my opinion the action could not be continued after final judgment. It would be giving the executors of the Plaintiffs power to go on with proceedings which would be entirely different from the action which was pending at their death. That cannot be done under rule 4. All that can be done under that rule is to carry on the action, but that is the action of the fifty-four Plaintiffs. It does not mean that after final judgment has been given the representatives of deceased Plaintiffs can maintain a separate action against the Defendants. The effect would be to put the Defendants in peril again at the suit of those who did not appear at the trial. No doubt it is to be treated in some respects as if there were separate actions, so that the Court may modify the language of the judgment, but it would be wrong to say that such a case would come under the rule so as to enable the Court to make, at the instance of those personal representatives of Plaintiffs who were not present at the trial, an order that the action shall be carried on between them and the Defendants thereto. If any question were to arise respecting the *Statute of Limitations*, we should have to consider what ought to be done, but in this case that question does not arise. I think the order of Mr. Justice *Kekewich* is right, and the appeal must be dismissed.

LINDLEY, L.J.:—

I am not prepared to go quite so far as Lord Justice *Cotton* in saying that the Court has no power to do what it is now asked to do. But the question here is whether there is anything in the circumstances of this case to render it necessary or desirable. I can see nothing here to make it necessary; and I do not see

that anything would be gained by it. There is no fear of the *Statute of Limitations* being set up, and I doubt if the cost of bringing a fresh action would be greater than of carrying on the present action. If the order were made I do not see that it would be of any real benefit to the Appellants. I do not think that the fact of there being admissions in the action which could not be used in a fresh action is sufficient reason for making the order. Therefore, even if we have jurisdiction, which I am inclined to think we have, I decline in this case to exercise it.

LOPES, L.J.:—

Having regard to the language of the 4th rule of Order XVII. I doubt if the rule applies after judgment, when the action is at an end, and there is nothing more to be done under it. But assuming that we have jurisdiction I am not satisfied that this is a case in which it is necessary or desirable to exercise it.

COTTON, L.J.:—

We have no doubt that the plea of *res judicata* could not be set up against the Appellants in a fresh action. The deceased Plaintiffs were not parties at the time of trial, and there is no judgment against them.

Solicitors: *Kimber; Burn & Berridge.*

M. W.

KAY, J.
1889
Feb. 1.

In re BOOR.
BOOR *v.* HOPKINS.

[1888 B. 4952.]

Local Board—Making up Road—Completion of Works—Assessment—Apportionment of Expenses—Owner—Notice—Demand—"Charge," when it commences—Debt—Public Health Act, 1875, *ss.* 150, 257 [*Revised Ed. Statutes, vol. xvii., pp.* 567, 602].

By the leases, in 1875 and 1877, of two houses abutting on a private road, the lessee covenanted to pay all rates and taxes and to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life, he paying "all outgoings and performing the covenants in the leases," and after his death upon trust for the son absolutely.

In July, 1884, the local board served notices on the father under s. 150 of the *Public Health Act*, 1875, requiring him to make up the portions of the road on which the houses abutted; but the notice was not complied with, and the board themselves did the work, which was completed in February, 1885. In June, 1885, the father died, and the son entered into possession of the houses. In September, 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road, and in February, 1887, he was served with demands and orders for payment of the assessed amounts by instalments, with interest:—

Held, in an action by the son claiming payment of the assessed expenses out of the father's estate, (1) that the expenses were not a debt due from the father's estate, inasmuch as the relation of debtor and creditor was not created by the *Public Health Act*, 1875, between the board and an owner of property for expenses incurred by the board: and (2) that the charge of the expenses under s. 257 could not be recovered by the son against the estate of the tenant for life.

By a lease, dated in 1875, the Ecclesiastical Commissioners demised to *George Chitty Boor* a house in the *Green Lanes, Hornsey*, called *Bratton Lodge*, for a term of eighty-two years, the lessee covenanting to pay "all sewers-rates and all other rates, taxes, and assessments now or hereafter to be imposed on or in respect of the said demised premises;" and also to pay to the lessors one-half of the expense incurred by them in making up and maintaining a road called *Portland Road*, leading out of the *Green Lanes*, and passing along one side of the demised premises.

By another lease, dated in 1877, the Commissioners demised to the same lessee an adjoining house, called *Ulleswater House*, for a term of seventy-nine years and a quarter, the lessee covenanting to pay all rates and taxes, as in the other lease, and also to make, construct, and finish the road, being *Portland Road*, in the rear of the premises, and keep it in repair till taken over by the parish; power being reserved to the lessors of themselves making the road and keeping it in repair, but at the expense of the lessee.

By a deed of gift dated the 16th of August, 1882, *George Chitty Boor* assigned *Bratton Lodge* and *Ulleswater House* to his son, *Leonard George Boor*, upon trust to pay the rents and profits thereof to the donor, *G. C. Boor*, during his life "he thereunto paying all outgoings and keeping the same hereditaments in good and sufficient repair and condition, and observing and performing the covenants and conditions contained in the leases under which the same are held:" and from and after the decease of the said *G. C. Boor* upon trust for the said *L. G. Boor* absolutely.

On the 31st of July, 1884, two notices, one relating to each of the houses, were served upon *G. C. Boor* by the *Hornsey* Local Board under the *Public Health Act*, 1875, requiring him, within thirty days, to sewer, pave, and make up those parts of *Portland Road* upon which the houses abutted. He, however, failed to comply with the notice, whereupon the board themselves did the work, the same being completed in February, 1885.

Subsequently, on the 17th of June, 1885, *G. C. Boor* died, having made his will dated the 20th of November, 1882, whereby, after reciting that he had already given to his son *Leonard George Boor* his, the testator's, said leasehold houses in the *Green Lanes, Hornsey* (naming them), "unincumbered," he made a gift and bequest to his son upon certain trusts and subject thereto to him absolutely: and the testator gave his residuary estate to his trustees and executors upon trust for sale, and, after payment of his debts and funeral and testamentary expenses, to invest the net proceeds of sale and pay the income to his wife for life, and after her death to hold the capital and income in trust for his children equally.

On his father's death *L. G. Boor* entered into possession of the

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two leasehold houses above mentioned under the deed of gift, and on the 23rd of September, 1886, he was served by the local board with notices, under the *Public Health Act*, 1875, apportioning the expenses of making up the road at £156 15*s.* in respect of *Bratton Lodge*, and at £81 17*s.* 2*d.* in respect of *Ulleswater House*.

On the 21st of February, 1887, notices were served on *L. G. Boor* demanding payment of the apportioned sums within ten years by specified annual instalments, with 5 per cent. interest; each notice being accompanied by an "order" of the board, under the *Public Health Act*, 1875, for payment of the apportioned sum and interest by instalments.

This originating summons was then taken out by *L. G. Boor* against the executors and trustees of his father's will, and the widow, to determine the question whether, as between the Plaintiff and the testator's estate, the estate was liable to pay the two sums in question, or whether the Plaintiff ought to pay them himself.

Levett, for the Plaintiff:—

First, I say that the testator's estate is liable to pay the sums in question, he having covenanted in the leases to pay all outgoings, and having shewn in his will an intention that the Plaintiff should have the property "unincumbered." Secondly, upon the construction of sects. 150 and 257 of the *Public Health Act*, 1875 (1), this was a debt due from the testator as the owner

(1) The material parts of sects. 150 and 257 of the *Public Health Act*, 1875, are as follows:—

Sect. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriageway, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, &c., require them to sewer, level, &c., within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor

"when the works were completed." It was recoverable as a debt in the ordinary way in addition to the mode of recovery by summary procedure specially provided by the Act, and, until recovery, was a charge on the property. *In re Bettesworth and Richer* (1) is a decision that the expenses incurred by the local authority are a charge coming into existence the moment the works are completed: though, on the other hand, in *Reg.* v. *Swindon New Town Local Board* (2) it was held that the material date to be considered is that of the service of the notice demanding payment.

S. Dickinson, for the Defendants, the Executors:—

I submit that at the time of the testator's death there was no debt due from him to the local board. In *West* v. *Downman* (3) it was distinctly held, with reference to the *Public Health Act*, 1848, and the *Local Government Act*, 1858, which contain provisions similar to those of the *Public Health Act*, 1875, that "the relation of debtor and creditor never can arise under these Acts between a board and an owner of property for expenses incurred by the board."

Vernon R. Smith, for the Defendant, the Widow.

KAY, J.:—

The testator was the lessee of two houses, one called *Bratton Lodge* and the other *Ulleswater House*. He took a lease of one of them in 1875 and of the other in 1877, covenanting with the landlords, in the usual way, to pay all the local rates, taxes, and

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of the urban authority, or (in case of dispute) by arbitration." . . . .

Sect. 257: "Where any local authority having incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." . . .

(1) 37 Ch. D. 535.
(2) 4 Q. B. D. 305.
(3) 14 Ch. D. 111.

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assessments, and to make and keep up the adjoining road. On the 16th of August, 1882, he made a deed of gift of these two houses to his son, *L. G. Boor*, in these terms. [His Lordship read the terms of the gift, and proceeded:—] Afterwards, in his lifetime, on the 31st of July, 1884, notice was given by the local board calling upon him to pave and sewer the road upon which these two houses abutted. He did not do so, and thereupon under the powers of the *Public Health Act*, 1875, the local board themselves undertook the works, and they were completed in February, 1885, still in the lifetime of the testator, who died in June, 1885.

After his death, in September, 1886, notices of assessment of the share of expenditure in putting this road in order attributable to these two houses were given, and they were served upon the son, who, under the deed of gift, had become entitled; and in February, 1887, orders were made for payment of the assessed amounts by instalments extending over ten years.

Now the son claims that his father's estate ought to pay these amounts because the works were done in his lifetime, although the amount due in each case was not assessed and no order for payment was made till after his death, and no summary proceeding was taken in his lifetime to recover the amount.

First of all, treating this as a claim of a debt due from the testator's estate, that point was decided distinctly in *West* v. *Downman* (1), where the Court of Appeal held, in the words of Lord Justice *Brett* (2): "That the relation of debtor and creditor never can arise under these Acts"—the *Public Health Act*, 1848, and the *Local Government Act*, 1858—"between a board and an owner of property for expenses incurred by the board. The first statute,"—the *Public Health Act*, 1848—"creates a liability previously unknown to the law, and gives a mode of enforcing it. Under these circumstances the only remedy is the remedy given by the Act. Under the first statute the remedy given is to enforce payment by summary proceedings before justices of the peace, and this does not create the relation of debtor and creditor. By *Jervis's Act* such proceedings must be taken within six months." Lord Justice *Cotton* refers to the enactment in the *Public Health*

(1) 14 Ch. D. 111. (2) 14 Ch. D. 120.

Act, 1848, empowering a public body to require an owner of property to make up an adjoining private road, and in case of default to do the work themselves and recover the expenses from the owner by summary proceedings, and says (1): "That enactment does not create any debt, but gives the public body a right to proceed in a particular way against the owner to recover the amount. There was, therefore no debt due from the testator, even if he was the person against whom summary proceedings to recover the amount ought to have been taken."

Accordingly it is clear that the enactments under which these works were done, viz., the *Public Health Act*, 1875, s. 150 and s. 257, do not create the relation of debtor and creditor between the person who was the owner at the time when the work was done, and the local board. Therefore any claim that the son should put himself in the place of the local board, and claim a debt against his father's estate is disposed of by that decision.

But the son does not put his case only in that way. He says, "This was an outgoing which my father ought to have paid under the covenant in the deed of gift, because the words, 'He thereunto paying all outgoings and keeping the same hereditaments in good and sufficient repair and condition,' amount to a covenant that he will pay all outgoings, and this was an outgoing in his lifetime." It would have been an outgoing in his lifetime if the amount had been assessed in his lifetime and a claim enforced against him under a summary procedure. But how was this an outgoing under the terms of that deed, when the fact is that no such proceeding ever was taken, no personal claim was made against him, and there is no remedy against his estate because the time has passed and the remedy is barred? No remedy existed when this claim was made except the remedy against the property. Now the remedy against the property is by way of charge; and it is argued that the charge practically existed when the work was completed. [His Lordship then read section 257, and proceeded:—] It seems to have been held —*In re Bettesworth and Richer* (2)—that the charge commenced at the moment of the completion of the works. In this particular case the testator was only tenant for life when the works were

(1) 14 Ch. D. 121. (2) 37 Ch. D. 535.

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completed, and there was no assessment until September, 1886, that is, after the testator was dead. The works were done all along the street; there has been an assessment of the expense and an apportionment of it among the different owners. I do not see how a charge could exist in any effective way before that apportionment was made. But if it did, what right has the son to make the tenant for life pay that charge? Obviously none. The charge is imposed, as a charge, from the 21st of February, 1887, to be paid in ten yearly instalments thereafter, and therefore only begins to be payable at that date.

But Mr. *Levett* relies upon the words of the will, which recognises this deed of gift and refers to it by this recital: [His Lordship read the recital, and continued:—] Mr. *Levett's* argument was that this means, "I direct that all incumbrances which shall be imposed upon these houses shall be discharged out of my estate." That carries the matter further than I can venture to go. The testator only recites what had actually taken place, that is, that no charge or incumbrance had been made at the date of the deed of gift.

I do not think these words amount to a gift of that charge to the son out of his father's estate, and therefore I think the claim fails, and the answer will be that the father's estate is not liable. The declaration will be that in the circumstances *L. G. Boor* has no right against the estate of the testator to be indemnified against this charge or any part of it.

Solicitors: *Carr & Son; Peacock & Goddard; Barlow & James*, agents for *Coxwell & Pope, Southampton.*

G. I. F. C.

LYON *v.* JOHNSON.

KAY, J.

1889

March 1.

[1889 L. 376.]

Arbitration—Partnership—Agreement—Reference—Action by one Partner—Staying Proceedings—Discretion—Common Law Procedure Act, 1854, *s.* 11 [*Revised Ed. Statutes, vol. xii., p.* 411].

Although, since the passing of the *Common Law Procedure Act*, 1854, a *primâ facie* duty is cast upon the Court by sect. 11 to act upon an agreement between two persons, such as partners, to refer any differences between them to arbitration (*Willesford* v. *Watson* (1)), yet under that section the Court has a discretion, which it is bound to exercise, whether, upon an application by the defendant in such an action, it will stay all further proceedings in the action or not.

A motion to stay proceedings under sect. 11 refused under the circumstances of the case.

BY articles of partnership dated the 4th of May, 1886, the Plaintiff and Defendant, both medical men, agreed to carry on the business of surgeons and apothecaries at *Bawtry, Yorkshire*, during their joint lives, under the firm of "*Johnson & Lyon.*"

Article 5 was as follows: "All salaries, remunerations, or other profits to arise from any appointment of the said partners, or either of them, in either of their professional capacities, and all premiums with apprentices, and all pecuniary presents and gratuities from patients, and all other professional emoluments whatever which may be received by the said partners, or either of them, shall be treated as profits of the said business and accounted for accordingly." Then the articles provided that "the net profits of the said partnership business" should be divided between the partners in equal shares; and article 16 was as follows: "If during the continuance of the said partnership, or at any time afterwards, any difference shall arise between the said partners, or between one of them and the executors or administrators of the other of them, or between their respective executors or administrators, in regard to the construction of any of the articles herein contained, or to any division, act, or thing to be made or done in pursuance hereof, or

(1) Law Rep. 8 Ch. 473, 480.

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to any other matter or thing relating to the said partnership or the affairs thereof, such difference shall be forthwith referred to two arbitrators, one to be appointed by each party in difference, or to an umpire to be chosen by the arbitrators before entering on the consideration of the matters referred to them, and every such reference shall be deemed an arbitration within the *Common Law Procedure Act*, 1854, and be subject to the provisions as to arbitrations contained in the said Act."

By arrangement between the Plaintiff and Defendant the practice was divided into two rounds, one being taken by the Plaintiff and the other by the Defendant. In the district comprised in the Plaintiff's round there resided an elderly lady, a Miss *Sampson*, who it was alleged was one of the patients of the partnership. She died on the 8th of November, 1888, having by her will appointed the Plaintiff one of her executors; and she bequeathed £100 to each of the executors who should prove the will, and devised to the Plaintiff a freehold house at *Everton* (subject to a life interest therein), and bequeathed to him her residuary personal estate, consisting of property of about £8000 in value.

On the 18th of December, 1888, the will was proved by the Plaintiff and the other executor, and shortly afterwards the Defendant asserted a claim to be entitled, under the partnership articles, to one-half of the property taken by the Plaintiff under the will. The Plaintiff, however, refused to recognise any such claim, whereupon the Defendant served the Plaintiff with a notice of the appointment of an arbitrator on his behalf, under the sixteenth clause of the articles of partnership, to settle the dispute as to whether the legacy and other benefits taken by the Plaintiff under the will, or any or either of them, were or was a pecuniary present or gratuity from a patient within the meaning of the articles, and as to whether the said legacy and other benefits, or any of them, should be treated as profits of the partnership business; and the Defendant required the Plaintiff to appoint an arbitrator on his behalf within seven days, failing which the dispute would be referred to the Defendant's arbitrator alone. The Plaintiff then issued his writ in this action, claiming a declaration that the benefits taken by him under the will were

not pecuniary presents or gratuities from a patient or other emoluments within clause 5 of the articles, or to be treated as profits of the partnership business; and an injunction to restrain the Defendant from referring the question to arbitration.

This was a motion by the Defendant, under sect. 11 of the *Common Law Procedure Act*, 1854, to stay all proceedings in the action on the ground that the matters in difference had been referred to arbitration.

From the affidavits filed on the motion it appeared to be the Defendant's contention that the Plaintiff became acquainted with Miss *Sampson*, the testatrix, solely through his attendance upon her as a medical man, and through the Defendant's introduction, she having been a patient of the Defendant's former firm before the Plaintiff came into partnership in 1886.

On the other hand, the Plaintiff said that he was acquainted with Miss *Sampson* prior to the commencement of the partnership, and that, having married shortly after the commencement of the partnership, he introduced his wife to her, and that he and his wife afterwards visited her constantly on terms of intimate friendship; also that his visits to her merely as her medical adviser were few and unimportant until she was seized with her final illness about a year after the date of her will, when he continually attended her professionally down to the time of her death; and he maintained that her bequests—which were made entirely without his knowledge—were made to him, not in consequence of his attendance on her as a patient, but simply by reason of her friendship with himself and his wife.

Renshaw, Q.C., and *F. L. Wright*, for the motion:—

Although one of the questions which we propose to refer to arbitration is one of law, namely, as to the construction of the deed, that is no answer to the application, under sect. 11 (1) of

(1) Sect. 11 of the *Common Law Procedure Act*, 1854, is as follows:—

"Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence

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the *Common Law Procedure Act*, 1854, to stay proceedings: *Randegger* v. *Holmes* (1). The decision of the questions at issue should be left to the tribunal the parties have themselves selected: *Willesford* v. *Watson* (2).

Marten, Q.C., and *N. R. Smart*, for the Plaintiff:—

Randegger v. *Holmes* related to a charterparty, and has no application to this case. An agreement to refer to arbitration does not oust the ordinary jurisdiction of the Court, and therefore cannot be pleaded in bar to ordinary proceedings: *Cooke* v. *Cooke* (3). The matters in dispute between the parties are such as can be much better tried by a Judge of the High Court than by arbitration.

Renshaw, in reply.

KAY, J.:—

In this case two persons entered into an agreement of partnership for carrying on the business of surgeons and apothecaries at *Bawtry*, in *Yorkshire*; and the agreement contains these two clauses. [His Lordship then read articles 5 and 16, and continued:—]

A lady who was living in the district usually worked by one

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any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which action or suit is brought, or a Judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such Court or Judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

(1) Law Rep. 1 C. P. 679.
(2) Ibid. 8 Ch. 473, 479.
(3) Ibid. 4 Eq. 77, 86, 87.

of these partners, died, having made a will by which she appointed him one of her executors, and gave him, among other benefits, the residue of her personal estate.

Two questions have arisen: first, was this lady a patient; and secondly, is this gift of residue within the words "all pecuniary presents and gratuities from patients, and all other professional emoluments." I will not express any opinion upon those questions. The partner of the gentleman to whom this residue was given appointed an arbitrator to decide these two questions, and called on the other partner to appoint his arbitrator; whereupon the other partner, the legatee, commenced an action in the High Court to have it declared that the bequests to him did not come within the words of the clause. The questions at issue are such as, in my opinion, would be better decided by a Judge of the High Court than by any arbitrator whatever: nevertheless I am clearly of opinion that they are questions coming within the terms of the arbitration clause, being, first, whether the lady was a patient; and secondly, if she was a patient, whether this was a "pecuniary present or gratuity from a patient, or other professional emolument." The latter is a question of the construction of the articles which by this action is submitted to the Court. Now, sect. 11 of the *Common Law Procedure Act*, 1854, says this: [His Lordship read the section, and continued:—] The words of that section are obviously intended to give the Court a discretion in the matter. Upon this, Lord *Selborne* says, in *Willesford* v. *Watson* (1), "Then we are told that this is an arbitrary tribunal, final and without appeal, and so forth, and that these are not fit questions to go before the arbitrator. But I think that the Legislature and the Act of Parliament under which the Court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *primâ facie* duty is cast upon the Courts to act upon such an agreement." I accept that statement entirely. It is said that the *primâ facie* duty of the Court at this moment is to stay this action. I can hardly

(1) Law Rep. 8 Ch. 473, 479.

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enter further into that question without going into the merits of the case, which I shall avoid doing at present. It is sufficient for me to say that I do not think this action ought to be stayed: accordingly I refuse the motion. The costs will be costs in the action.

Solicitors: *Belfrage & Co.*, agents for *Cartwright & Walker, Bawtry; Bolton & Co.*, agents for *Hodding & Beevor, Worksop.*

G. I. F. C.

NORTH, J.
1889
Feb. 12.

In re DETMOLD.
DETMOLD *v.* DETMOLD.

[1888 D. 1381.]

Settlement of Settlor's own property—Limitation to Settlor for life determinable on Alienation—Validity.

A marriage settlement of the settlor's own property was made on trust to pay the income to himself "during his life, or till he shall become bankrupt, or shall assign, charge, or incumber the said income, or shall do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons;" and, from and after the determination of the trust in favour of the settlor, upon trust to pay the income to his wife during her life:—

Held, that the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband.

ORIGINATING summons to determine whether a forfeiture clause in a settlement was valid.

By a marriage settlement dated the 24th of August, 1881, it was declared that a sum of stock already transferred by the husband to the trustees of the deed should be held by them upon trust to pay the income to the husband "during his life, or till he shall become a bankrupt, or shall assign, charge, or incumber the said income, or shall do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons;" and from and after the determination of the aforesaid trust in favour of the husband the trustees were to pay the income to the wife during her life, for her separate use. On the 8th of June, 1888, a creditor recovered a judgment for debt against the husband, and on the 13th of July he obtained an order in the action, restraining the trustees from paying the income to the husband. On the 19th of July the creditor obtained an order in the action, appointing himself receiver of the income due or becoming due upon and arising from the stock comprised in the settlement. This order was made in the presence of the husband. On the

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25th of September, 1888, a receiving order in bankruptcy was made against the husband, and he was afterwards adjudicated a bankrupt upon an act of bankruptcy committed on the 29th of July. The question was, whether the forfeiture had taken effect in favour of the wife, or whether the forfeiture clause was void as against the trustee in the bankruptcy.

Beddall, for the Plaintiff.

Cozens-Hardy, Q.C., and *Robert Morris*, for the wife:—

There is nothing to prevent a man from settling his own property on trust for himself for life, or until he shall alienate his interest, or do or suffer something which shall deprive him of his right to receive the income. It is not like a forfeiture clause in the event of bankruptcy; such a clause is void because it is a fraud on the bankrupt law. It has often been held that a clause providing for forfeiture in the event of a voluntary alienation is valid, and the same principle applies to an involuntary alienation by process of law in favour of a particular creditor: *Brooke* v. *Pearson* (1); *Knight* v. *Browne* (2).

[NORTH, J., referred to *Higinbotham* v. *Holme* (3).]

The forfeiture took effect in favour of the wife on the making of the order appointing a receiver on the 19th of July. The act of bankruptcy had not then been committed.

Bethune Horsbrugh, for the receiver under the order of the 19th of July:—

There is no distinction between forfeiture on alienation by bankruptcy, and forfeiture upon any other involuntary alienation. In either case the gift over is void. A forfeiture clause in relation to a man's own property is good only in the case of a voluntary alienation: *Wilson* v. *Greenwood* (4). This follows from *Higinbotham* v. *Holme*.

Muir Mackenzie, for the trustee in the bankruptcy:—

An order appointing a receiver by way of equitable execution

(1) 27 Beav. 181.
(2) 9 W. R. 515.
(3) 19 Ves. 88.
(4) 1 Swanst. 471, 481.

gives the creditor who obtains it no security on the property of the debtor as against the trustee in his bankruptcy: *In re Dickinson* (1).

The principle of *Higinbotham* v. *Holme* (2) applies to forfeiture on any involuntary application by operation of law, the effect being to defeat creditors: *Ex parte Stephens* (3). The appointment of the receiver had no practical effect, there being no dividend accruing due before the commencement of the bankruptcy, and the forfeiture really took effect upon the bankruptcy. A receiver ought not to be appointed when ordinary legal execution is available: *Manchester and Liverpool District Banking Company* v. *Parkinson* (4). The dividends might have been attached in the hands of the trustees, and in that case there would have been no forfeiture. An attachment works only a temporary alienation for the purpose of satisfying a particular debt, and the forfeiture clause contemplates a permanent, not a temporary, alienation: *Ex parte Dawes* (5).

Cozens-Hardy, in reply:—

The authority of the two cases on which I rely has not been impeached. The ground of *Higinbotham* v. *Holme* was that the forfeiture would be a fraud on the bankrupt law. That does not apply to forfeiture or alienation by operation of law in favour of one creditor.

NORTH, J.:—

The question is, whether the life interest given by the settlement to the wife is now subsisting, or whether it is invalid as against the trustee in the bankruptcy of the husband. In my opinion the wife's life interest is valid as against the receiver appointed by way of equitable execution by the order of the 19th of July, because he was merely a particular creditor. A settlement by a man of his own property upon himself for life, with a clause forfeiting his interest in the event of alienation, or attempted alienation, has never, so far as I know, been defeated

(1) 22 Q. B. D. 187.
(2) 19 Ves. 88.
(3) 3 Ch. D. 807.
(4) 22 Q. B. D. 173.
(5) 17 Q. B. D. 275.

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in favour of a particular alienee; it has only been defeated in favour of the settlor's creditors generally, on the ground that it would be a fraud on the bankrupt law. Under the trusts of this settlement the wife is now clearly entitled to the income, if the prior life interest given to the husband has legally come to an end. In my opinion the appointment of a receiver by the order of the 19th of July established that the husband had done or suffered something whereby the income of the trust fund, or some part thereof, "would through his act, default, or by operation of law, if belonging absolutely to him, become vested in or payable to some other person." It was a decision arrived at in the presence of the husband that, as between him and the judgment creditor, the income belonged to the latter. The trustee in the bankruptcy is also bound by that order, because the bankruptcy did not commence until the 29th of July. Before that date the husband had done an act, had suffered something, by which the right to receive the income had become vested in another person, and, therefore, the gift over in favour of the wife had taken effect. It is said that a gift over of a man's own property in the event of his bankruptcy is void, and no doubt that is so. But it has been held that a gift over in the event of a voluntary assignment by him is valid. This was established by *Brooke* v. *Pearson* (1) and *Knight* v. *Browne* (2), and I think the principle of those decisions applies to an involuntary alienation by operation of law in favour of a particular creditor. The distinction between those cases and a clause of forfeiture in the event of an alienation in favour of creditors generally resulting from bankruptcy, was pointed out by Vice-Chancellor *Bacon* in *Ex parte Stephens* (3). In my opinion, those authorities shew that the limitation of the life interest to the settlor was validly determined by the fact that, in consequence of the order appointing the receiver, he ceased to be entitled to receive the income. This took place before the commencement of the bankruptcy, and, therefore, the forfeiture is valid as against the trustee in the bankruptcy.

Solicitors; *A. Myers; Tatham, Oblein, & Nash; W. W. Aldridge.*

(1) 27 Beav. 181. (2) 9 W. R. 515. (3) 3 Ch. D. 807.

W. L. C.

NORTH, J.

1889

Feb. 15.

In re POPLE. *Ex parte* BAKER.

6 Anne, c. 18—Cestui que Vie—Executory Devise.

The devisee of land in case of the death of another without leaving issue is a person who has a claim in expectancy to an estate after the death of a person, within the meaning of 6 Anne, c. 18, s. 1.

A close of land was devised to *M. A. T.* in fee, but in case she should die without leaving lawful issue, to others. *M. A. T.* married and left her husband, having had no issue. He died in May, 1888. Orders were made in June and August, 1888, respectively that *A. F.*, who had bought the interest of *M. A. T.*, should produce her first at *W.* church door, secondly, in Court; she not having been produced, and *A. F.* not having proved that she was alive:—

The Court ordered that she should be taken to be dead.

By a codicil to his will dated the 13th of May, 1864, *William Pople*, late of *Wedmore, Somersetshire*, devised a close of land in *Stokehouse*, in the parish of *Rodney Stoke*, to his granddaughter, *Mary Ann Tibbs*, her heirs and assigns. But in case his "said granddaughter should die without leaving lawful issue living at the time of her decease, then to *George Baker*, *Joseph Toogood*, and *Mary Jane*, his wife, *Albert Baker*, *Richard Baker*, *Henry Waggett* and *Elizabeth Ann*, his wife, *Thomas Baker* and *Edward Baker*" (the Applicants in this matter), "in fee as tenants in common."

The testator died in 1869, and his will and codicil were duly proved.

Mary Ann Tibbs after the death of her grandfather married *John Fowler*. There was no issue of the marriage. She had deserted her husband. Neither the date of the marriage nor the age of *Mary Ann Fowler* was in evidence. There was no precise evidence as to the date when *Mary Ann Fowler* left her husband. Her brother-in-law, *Abraham Fowler*, deposed that it was in 1886, but in cross-examination he said he was not sure it was at that time. Another witness believed it was not more than three or four years ago.

In 1879 the estate and interest of *John Fowler* and his wife in the close were sold and conveyed to the Respondent, *Abraham*

NORTH, J.

1889

In re POPLE. *Ex parte* BAKER.

Fowler, who was tenant in possession at the date of this application. *John Fowler* died in May, 1888.

The Applicants obtained an order under the statute 6 Anne, c. 18, dated the 22nd of June, 1888, against the Respondent, for the production of *Mary Ann Fowler* at the door of *Wedmore* parish church on the 23rd of July, 1888. She was not produced. They obtained a second order dated the 7th of August, 1888, for her production at the bar of the Court on the 24th of October, 1888. The Court did not sit until the following day. *Mary Ann Fowler* was not produced, and the Respondent admitted that he could not produce her.

This was a motion for an order under the above-named statute that *Mary Ann Fowler* might be deemed to be dead and that the Respondent might be ordered to pay the costs of the two former orders and the order now moved for.

One witness deposed that he had passed *Mary Ann Fowler* in February, 1888, in *Bristol*. Another witness deposed to having seen her in 1887. On the other hand it was sworn that *John Fowler* had said before he died that his wife was dead.

There was evidence that her habits were such that she was not likely to marry, and she was known to have been in *Bristol* in 1886.

Cozens-Hardy, Q.C., and *Germaine*, for the motion :—

The Applicants are persons entitled in expectancy on the death of *Mary Ann Fowler* (in the events which have happened) to an estate in land. Neither of the two orders for production having been complied with, the Applicants are entitled to the third order provided for by the Act, that she be taken to be dead, unless the Respondent can affirmatively satisfy the Court of two things, first, that he has used his best endeavours to produce the *cestui que vie*, and also that she is alive. There is certainly no evidence sufficient to say positively that she is alive now.

Rawlins, for the Respondent, *Abraham Fowler* :—

This case is not within the Act. *Mary Ann Fowler's* estate is " determinable " not " upon a life or lives," but only in the event of her dying without leaving issue living at her death; and that

is not a "particular estate or interest" within the meaning of the Act.

At all events the onus is upon the Applicants to establish affirmatively that *Mary Ann Fowler* is dead without issue: for until that is established, the interest given under this executory gift over does not arise; and they have not discharged that onus. Even if she ought to be deemed to be dead, it is quite possible that she may have re-married after *John Fowler's* death and had issue; and there is no evidence to the contrary.

Further, upon the evidence, the balance of probability is in favour of *Mary Ann Fowler* being still alive, and the presumption of law in favour of the continuance of life stands unrebutted.

[NORTH, J.:—I do not see what I have to do with that presumption. I have to deal with the words of an Act of Parliament.]

In any event, the Applicants are not entitled to the costs of their previous *ex parte* application or of this motion. *Abraham Fowler* has not been guilty of any "refusal or neglect" to produce *Mary Ann Fowler*.

NORTH, J.:—

I think the Applicants are entitled to the order they now move for. The first question is, whether they are persons entitled to apply under the statute; and for this purpose suppose the gift over had been on this woman's dying in the lifetime of the Applicants, or some other event, not being the event of her dying without leaving issue. It seems to me the Applicants would then be persons entitled to make the application under the Act, for it may be made by persons who have "any claim or demand in or to any remainder, or reversion, or expectancy," and it is to be made against "persons having estates or interests determinable upon a life or lives." What the statute means by an estate determinable upon a life or lives is an estate determinable upon a death or deaths. That, though rather inartificially expressed in the Act, is clear. That being so, the Applicants would in the case I have supposed be entitled on the expiration of the life to take the fee simple. It seems to me they would be

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equally entitled, though their interest was not in reversion or remainder, but in expectancy under an executory devise over.

The next point is, the interest of *Mary Ann Fowler* being determinable, not simply on her death, but on her death without issue, does that make any difference? If the state of things were such that she could not have had issue, for example, if when last seen she had been seventy years old and had never been married, it would be impossible she should have issue; and the Applicants would be entitled to apply, though the form of the limitation was in case of death without issue.

The next question is what is the proper application of the facts proved in this case. *Mary Ann Tibbs* married one *John Fowler*, and for a considerable time they lived together; but she deserted him three or four years ago, and the only evidence of her being seen since is that of two persons which is not very satisfactory; one says he saw her in November, 1887, the other that she passed her about February, 1888. I am not satisfied that the person seen on those occasions was this woman. Her husband died in May, 1888, and he was asked about her and said he believed she was dead. Of course it is open to the observation that he was a person likely to have wished that. But I do not think he would be the last person likely to hear of her death, I think it would very probably come to his ears. I have not to decide whether she is dead or not, but only whether for the purpose of the Act she is to be taken to be dead, subject to the estate being given up again if it can afterwards be shewn that she is alive. In my opinion a case has been made for making an order that *Mary Ann Fowler* be deemed to be dead.

Then the 4th section says that if any such person holding or having any estate or interest determinable upon the life or lives of any other person (that is, in this case *Abraham Fowler*, who has bought the property) shall to the satisfaction of the Court make it appear that he has used his utmost endeavours to procure or compel such person on whose life such estate or interest doth depend to appear—pausing there, I think *Abraham Fowler* has done all that can be expected under such words, and there is the more reason that he should, for it was obviously his interest to do so. But then the section continues, "and that such infant,

married woman, or other person or persons, on whose life or lives such estate or interest doth depend, is, are, or were living at the time of such return made and filed as aforesaid, then it shall be lawful for such person or persons to continue in possession." That is to say, he is first of all to produce the *cestui que vie*; if he cannot, and can shew that it is not his fault, then what he has to do is to shew that the life is still in existence. In my opinion the Respondent has not done that, and the Applicants are entitled to an order subject only to the question whether the fact that they are entitled only in case *Mary Ann Fowler* died without leaving issue makes any difference. I have already said that it does not prevent their being persons who may apply under the Act. In the present case I think there is fair ground for believing there was no issue. It is clear that there was no issue of the marriage. The husband only died last May. It is exceedingly improbable that she can have had issue. It is just possible she may have married, but there is strong reason for supposing she has not married even if she be alive. But these proceedings are taken on the footing that she is dead, and if she be dead there is still stronger reason for concluding that there was no issue.

I do not give any costs for this reason. The statute says nothing about costs. I do not go on that ground. But I think it is a case in which, looking at the circumstances, the Respondent was entitled to require the Applicants to come before the Court.

Solicitors for Applicants: *H. Kimber & Co.*, agents for *J. F. Bailey, Wedmore, Somerset.*

Solicitors for Respondents: *Robbins, Billing & Co.*

D. P.

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1889

Feb. 22, 25.

In re TENNANT.

[1888 T. 2197.]

Money representing Land—Interim Investment—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 34 [*Revised Ed. Statutes, vol. xviii. p.* 338]—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 33.

The proceeds of settled land sold under the *Settled Estates Act*, 1877, was invested under an order of the Court in Consols in the name of trustees appointed to receive the purchase-money till it could be applied to the purposes mentioned in the 34th section of that Act:—

Held, that the trustee might sell the Consols and reinvest in securities mentioned in sect. 21 of the *Settled Land Act*, 1882.

CHARLES EDMUND TENNANT died in January, 1862, having by his will devised real estate to the use of *Charles R. Tennant* for life, with remainders over in settlement.

By two orders, dated respectively the 15th of February, 1878, and the 21st of November, 1878, contracts for the sale of the estate settled by the above-mentioned will were confirmed. By the first order three trustees (the respondents in this summons) were appointed trustees for the purpose of receiving the purchase-money, and they were directed to apply the proceeds of the sales in discharging an incumbrance of the testator and to apply the residue to some one or more of the purposes mentioned in the 34th section of the *Settled Estates Act*, 1877, without any application to the Court, and until the same could be so applied to invest the same in the purchase of Consols in their names and receive the interest and apply the same upon the trusts contained in the will concerning rents and profits.

The trustees received the purchase-money, and after satisfying the incumbrance on the estate invested the residue in the purchase of 3 per cent. Consols.

The Consols were converted into $2\frac{3}{4}$ per cent. Consols, and there were now standing in the names of the trustees the sum of £17,422 19*s.* 9*d.*, $2\frac{3}{4}$ per cent. Consols.

The tenant for life took out a summons under the *Settled Land Act*, 1882, to obtain the opinion of the Court as to whether

the sum invested in Consols might be invested or otherwise applied in accordance with the 21st section of the *Settled Land Act*, 1882.

The Judge in Chambers decided that such investment was not authorized. The tenant for life now moved to have the order in Chambers discharged or varied, and that an order might be made for the reinvestment of the above-mentioned proceeds of sale in accordance with the 21st section of the *Settled Land Act*, 1882, and the income of such investment applied in accordance with the provisions in the will.

Kirby, for both the tenant for life and the trustees :—

The money now invested in Consols is money in the hands of trustees liable to be invested in land. It is therefore, by virtue of sect. 33 of the *Settled Land Act*, 1882, authorized to be invested in any of the securities mentioned in sect. 21 of that Act. If the Court cannot sanction the proposed investment on that ground it can upon the grounds put by Mr. Justice *Chitty* in the case of *In re Mackenzie's Trusts* (1), that as the investment could be made indirectly under the *Settled Land Act* by first purchasing land and then selling it, it may be done by one operation.

NORTH, J. (after stating the facts, continued) :—

An application is made to me that I should direct the money to be invested in certain railway stock on the ground that the combined operation of sects. 33 and 21, sub-s. 1, of the *Settled Land Act* sanctions such investment.

The difficulty I feel in complying with the application on that ground is that there is already an express order of the Court directing the way in which the money is to be invested until it can be invested under sect. 34 of the Act of 1877. I feel a difficulty in altering, interfering with, or adding to the order so made. But a case was cited by Mr. *Kirby*, *In re Mackenzie's Trusts*, in which Mr. Justice *Chitty* allowed money bequeathed to trustees on trust to be laid out in land in strict settlement, to be invested in debenture stock. He did so on the ground that the money was to be invested in the purchase of land, and if such investment

(1) 23 Ch. D. 750.

NORTH, J. 1889 *In re* TENNANT.

had been made the land purchased could have been sold and the proceeds invested in the desired securities under the *Settled Land Act;* and as the result could be obtained by two processes he thought it might also be effected by one. Finding such a case decided and reported, I follow it.

Solicitors for all parties: *Gedge, Kirby, & Millett.*

D. P.

NORTH, J. 1889 *March* 4.

KING *v.* DICKESON.

[1888 K. 983.]

Restrictive Covenant as to Use of Land—Estate sold in Lots—Mutual Covenants by Purchaser of Lots with Vendor and Purchasers of other Lots—Subdivision of Lot—Right of Owner of one Part to enforce Covenant as against Owner of the other.

On the sale of a building estate in lots the purchaser of each lot entered into a covenant with the vendor and with the purchasers of the other lots not to build upon his lot beyond a specified building line. The purchaser of one lot mortgaged a part of his lot. The mortgagee had notice of the covenant, but no express restriction as to the use of the land was imposed on him by the mortgagor. The mortgagee afterwards foreclosed and sold the mortgaged land, part of which ultimately became vested in the Defendants by purchase. The Defendants, as well as the sub-purchasers through whom they claimed, took with notice of the restrictive covenant:—

Held, that there was no implied obligation as between the mortgagor and the mortgagee restricting the use of the land, and that the mortgagor was not entitled to enforce the restrictive covenant as against the Defendants.

THIS action was brought by *Henry King*, claiming an injunction to restrain the Defendants from building on a piece of land, situate in *Ramsden Road, Balham*, in their possession, any building within fifteen feet of *Ramsden Road*, except fences not more than six feet high.

King was the owner of some adjoining land situate in the same road. *King's* land and the Defendants' land had both formed part of an estate belonging to the *British Land Company*, which had been sold by them in lots. *King's* land and the Defendants' land had both formed part of Lot 258, which lot was purchased by *King*, and was conveyed by the company to him by a deed dated

the 20th of June, 1874. Lots 258 to 298 of the estate were offered for sale by auction on the 27th of September, 1869, subject to certain stipulations, which were printed on a lithographed plan of the property. Lot 258 was not then sold, and *King* afterwards became the purchaser of it. The conveyance by the company to him contained a recital that Lot 258 was sold to him subject to the stipulations specified in a schedule to the deed, which were those which had been printed on the lithographed plan. The deed contained the following mutual covenants:— "the vendors (as to so much of the land to which the said stipulations relate as remains vested in them) for themselves and their assigns, and the purchaser (as to the land hereby conveyed) for himself, his heirs, executors, administrators, and assigns, do hereby respectively covenant and grant with and to each other, and as to the purchaser also with and to the owners or owner of any other land to which the benefit of the said stipulations is attached, and their, his, or her respective heirs and assigns, that the covenantors respectively, and their respective heirs and assigns, will henceforth observe, perform, and comply with the said stipulations, so far as the same relate either to the rights or to the duties of the purchaser, his heirs or assigns, in respect of the land hereby conveyed, and that nothing shall either be erected, fixed, placed, or done upon the land as to which they respectively covenant, or any part thereof, in breach or violation, or contrary to the fair meaning of the said stipulations." There was a proviso limiting the liability of the covenantors respectively to the periods of their ownership respectively. The stipulations specified in the schedule to the deed included the following: "Nothing is to be erected within fifteen feet of *Ramsden Road* except fences, and those not more than six feet high." Similar covenants were entered into by the purchasers of the other lots.

On the 15th of April, 1879, *King* made an equitable mortgage of part of Lot 258 to Messrs. *Furber & Price*. The mortgagees had notice of the restrictive covenant, but the mortgage contained no stipulation limiting the use of the land by them. The mortgagees afterwards brought an action for foreclosure against *King*, and on the 2nd of November, 1883, an order was made in

NORTH, J. 1889 KING v. DICKESON.

that action declaring that the then Plaintiffs were entitled to the mortgaged property free from all right and equity of redemption in the same, and directing the Defendant *King* to execute a proper conveyance thereof to the then Plaintiffs. *King* refused to execute the conveyance, and on the 8th of December, 1883, another order was made vesting the mortgaged property in the then Plaintiffs for all the estate therein of *King*. *Furber & Price* afterwards sold the mortgaged property to *Robert Penstone*, and he resold it to a Mrs. *Ball*. The Defendants were in possession of part of the mortgaged property under a building agreement with Mrs. *Ball*, and they proposed to build beyond the line fixed by the restrictive covenant. It was admitted that *Penstone*, Mrs. *Ball*, and the Defendants respectively acquired the land with notice of the original restrictive covenant. The conveyance to Mrs. *Ball* was expressly made subject to the covenant.

Napier Higgins, Q.C., and *Eustace Smith*, for the Plaintiff:—

It is suggested that the Plaintiff cannot maintain the action. But the general building scheme imposed on the owner for the time being of any part of the land included in it, who acquired his land with notice of the restriction, an obligation to observe that restriction, whether he was or was not in direct privity with the original vendor. Mrs. *Ball*, indeed, took expressly subject to the covenant, and became liable to it as if she had been the covenantor. It could not have been intended that the estate should be split up into parts, some of which should be free from the covenant. Every lot is burdened with the obligation to the owners of all the other lots, and if a lot is subdivided the obligation attaches to every part of it. The object of the scheme was to protect every part of the estate: *Renals* v. *Cowlishaw* (1); *Western* v. *MacDermott* (2); *Keates* v. *Lyon* (3). This collateral right of the Plaintiff in respect of the land can only be got rid of by some agreement; the agreement to mortgage is not of itself sufficient to extinguish it. By the judgment in the foreclosure action *King* was ordered to execute a proper conveyance to the mortgagees; under that order the Judge would have

(1) 9 Ch. D. 125; 11 Ch. D. 866. (2) Law Rep. 2 Ch. 72.
(3) Law Rep. 4 Ch. 218.

directed the insertion of a covenant by the mortgagees to observe the building line. There was an implied obligation on the part of the mortgagees to do so, and the purchasers from them are under the same obligation.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Defendants, were not heard.

NORTH, J.:—

I think the case is free from doubt. [His Lordship stated the facts, and continued:—] The Defendants have acquired part of Lot 258, subject to the original restrictive covenant. Other lots of the estate have been conveyed to other purchasers, who, as it appears, have in many instances built on their lots houses having bay windows projecting beyond the building line.

The question for my decision is, whether the Defendants, who are purchasers of part of Lot 258, upon which they are proposing to build beyond the building line, can be restrained from so doing—not by the purchaser of another lot—but by the owner of the remainder of the same Lot 258. There was no agreement entered into between the Plaintiff and his mortgagees as to the user of the land comprised in the mortgage, and though, no doubt, the mortgagees took the land subject to the obligations then existing in respect of it, and, therefore, subject to the right of the owners of the other lots to compel the observance of the restrictive covenant, there was nothing to prevent the owner of Lot 258 from building upon it in any way he pleased, provided that none of the owners of the other lots objected to his doing so. It has been suggested that the owners of the other lots have in many cases lost by reason of their conduct the right which they originally had to object to a breach of the covenant by the owner of Lot 258. If they have all lost that right the owner of that lot would be entitled to build upon it in any way he pleased. It is suggested that the mortgagee of a part of Lot 258 entered into some new obligation with his mortgagor, the owner of the other part, as to the user of the mortgaged part. For that suggestion I can see no colour whatever. In my opinion the owner of Lot 258 conveyed the part of it comprised in the mortgage to

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the mortgagee subject to all rights then existing in relation to it, but did not by implication create as against the mortgagee any new right or obligation in his own favour, and, not having created any such new right or obligation as against the mortgagee, he cannot now set it up as against a purchaser who derives title through the mortgagee. The action, therefore, fails, and must be dismissed; but this, of course, will not affect any claim which may be made by the owners of the other lots to prevent the Defendants from building in contravention of the restrictive covenant.

Solicitors for Plaintiff: *R. & A. Russell.*
Solicitors for Defendants: *Hopgood & Dowson.*

W. L. C.

In re DAVIS & CAVEY.

STIRLING, J.

1888

Dec. 11, 12.

Vendor and Purchaser—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9 [*Revised Ed. Statutes, vol. xvii., p* 289]—*Misdescription—Contract for Sale—Leasehold Business Premises—Lease—Restrictive Covenants—Defect in Title—Jurisdiction—Return of Deposit.*

At a sale by auction property described in the particulars as "leasehold business premises" was put up for sale under conditions providing that the title should commence with the conveyance to the vendors, and that no objection should be made in respect of anything contained in the lease. Nothing was said in the particulars or conditions as to the contents of the lease; no opportunity was given to intending purchasers to inspect the lease, and the property was bought by a purchaser who had not in fact inspected it.

After the sale the purchaser discovered that the lease contained covenants restricting him from carrying on upon the premises any trade or business or doing any act to the nuisance, annoyance, or damage of the lessors or the adjoining tenants, or using the premises as a public-house. He then took out a summons under the *Vendor and Purchaser Act*, 1874, for a declaration that the vendors had not shewn a good title under the contract, and for a return of the deposit which he had paid on the purchase:—

Held (first), that as the property was put up for sale as business premises the purchaser was entitled to have an assignment of property on which he could carry on any business, subject only to the restrictions imposed by the general law, or in force as to any particular trade.

Held (secondly), that as the covenant imposed serious restrictions upon the use of the premises as business premises, the purchaser was entitled to a declaration that the title was not such as he could be compelled to accept, but *held* (without prejudice to his right to bring an action for return of the deposit), that he was not entitled to any further relief upon the summons.

THIS was a purchaser's summons under the *Vendor and Purchaser Act*, 1874, for a declaration—(1) that the vendors had not shewn a good title under a contract dated the 22nd of March, 1888, for the sale of a leasehold house, known as No. 12, *Chester Place, Plumstead*; and (2) that the Applicant was entitled to a return of the deposit of £30 paid by him under the contract, together with interest thereon, and the costs of investigating the vendors' title.

The property in question was purchased at a sale by auction.

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On the cover, and also on the first page of the particulars of sale, it was described as "leasehold business premises, with dwelling-house, cow-houses, &c."

The material conditions of sale provided as follows:—

"4. The title shall commence with the indenture of conveyance to the vendors, and no earlier title shall be required to be furnished or investigated. . . . . The last receipt for ground-rent payable by the vendors shall be taken as conclusive evidence of the performance of covenants and conditions affecting the premises, or a waiver of every breach thereof up to the time of completion of the purchase. No evidence shall be required that such receipt is under the hand of the person properly qualified to give the same. No objection shall be made . . . . in respect of any clause, matter, or thing contained in or omitted from the original lease of the premises, or other document or documents of title.

"8. Should any mistake or omission have been made or appear in the particulars of sale, the same shall not annul the contract, nor shall any compensation be allowed to the vendors in respect thereof. The property is sold subject to existing tenancies and to all easements and liabilities affecting the same."

There was also the usual condition enabling the vendors, in case they should be unable or unwilling to comply with the purchaser's objections, to annul the contract upon returning the deposit without interest.

Nothing was said either in the particulars or conditions of sale as to the terms of the lease under which the property was held, nor was any inspection of such lease offered to intending purchasers; and as a matter of fact the purchaser did not inspect such lease before purchasing the property. At the sale the Applicant *David Davis* was declared the purchaser of the property at the price of £300, and under a condition in that behalf he signed the contract for purchase, and paid a deposit of £30, or 10 per cent. upon the purchase-money.

An abstract of title was duly delivered to the purchaser, which commenced with an indenture, dated the 28th of October, 1886, whereby the property had been conveyed to the Respondents

John Cavey and *James Cavey* for the residue of a term of sixty-five years from Michaelmas, 1856, granted by an indenture of lease, dated the 4th of September, 1860; but the abstract made no mention of the covenants contained in such lease.

After delivery of the abstract, the purchaser's solicitor, upon attending the vendors' solicitor to inspect the documents of title, was shewn the lease, and he then, for the first time, discovered that it contained a covenant by the lessee, his executors, administrators, and assigns, not to "exercise or carry on, or permit or suffer any other person or persons to exercise or carry on, in or upon the said premises hereby demised, or any part thereof, any trade, business or occupation, or to do any act which shall or may be or grow to the annoyance, nuisance, or damage of the said lessors, their heirs or assigns, or of the person or persons entitled as aforesaid (being the person or persons entitled for the time being to the immediate reversion), or of the tenants of their adjoining property, or open or use any part of the said premises as or for a public-house or beershop, without the consent in writing of the said lessors, their heirs or assigns, or of the person or persons entitled as aforesaid."

Upon discovering that the lease contained this restrictive covenant, the purchaser claimed rescission of the contract and a return of his deposit, and after some correspondence took out this summons. At the date of the contract the premises were let upon a quarterly tenancy, but, notwithstanding the covenant, they had been previously used for some time as a dairy.

Graham Hastings, Q.C., and *Farwell*, in support of the summons:—

The premises were described in the particulars as "business premises," and were sold and bought as such, whereas it turns out that they are subject to an absolute covenant not to carry on, or permit to be carried on, any business whatever. This is a restrictive covenant of an unusually stringent character, and the purchaser, who had no fair opportunity of inspecting the lease, is entitled to a declaration that the vendors had not shewn a good title, and to a return of his deposit: *Reeve* v. *Berridge* (1);

(1) 20 Q. B. D. 523.

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Hyde v. *Warden* (1). The vendors cannot, under condition 4, compel the purchaser to accept a defective title: *Nottingham Patent Brick and Tile Company* v. *Butler* (2).

W. Pearson, Q.C., and *J. Cutler*, for the vendors:—

The lease was always open to inspection, and the purchaser might have seen it if he had chosen to ask for it. *Reeve* v. *Berridge* (3) and *Hyde* v. *Warden* were cases of sales by private contract. But this was a sale by public auction, and the particulars and conditions of sale, which shewed that the property was leasehold, and referred to the lease and the covenants and conditions contained in it, put the purchaser on inquiry, and having made no inquiry he has constructive notice of the terms of the lease, is bound by the covenants, and must accept the title: *Grosvenor* v. *Green* (4); *Hall* v. *Smith* (5). Again, according to the true construction of this covenant it is not an absolute covenant prohibiting the carrying on of any kind of business. The words "or do any act whatsoever which shall or may be or grow to the annoyance, nuisance or damage of the lessors," shew that it is only intended to apply to trades, businesses, or occupations, the carrying on of which involves "annoyance, nuisance, or damage."

Moreover the purchaser is bound by the conditions of the contract which he has entered into, and has agreed to take a title of a particular character; and even if he might have had a good defence to an action for specific performance by the vendors he cannot come to the Court and ask for a return of his deposit on the ground of hardship: *Lawrie* v. *Lees* (6); *Nottingham Patent Brick and Tile Company* v. *Butler*.

Hastings, in reply:—

This is not the case of one single covenant; there are three separate covenants: (1) not to carry on any business; (2) not to do any act amounting to annoyance, nuisance, or damage; and (3) not to use the premises as a public-house or beershop; and upon any construction these covenants are so restrictive as to

(1) 3 Ex. D. 72.
(2) 16 Q. B. D. 778, 786.
(3) 20 Q. B. D. 523.
(4) 5 Jur. (N.S.) 117; 28 L. J. (Ch.) 173.
(5) 14 Ves. 426, 432.
(6) 7 App. Cas. 19.

entitle the purchaser to relief: *Ellis* v. *Rogers* (1); *Hampshire* v. *Wickens* (2).

Mere notice of a lease in a contract is not sufficient to fix a purchaser with notice of all the contents of the lease unless he had a fair opportunity of inspecting the lease; and there is no distinction on this point between sales by public auction and private contract: *Reeve* v. *Berridge* (3). In that case *Grosvenor* v. *Green* (4) was treated as overruled. The vendors cannot make a good title, and the Court has jurisdiction upon this summons to order the deposit to be returned to the purchaser: *In re Smith and Stott* (5); *In re Hargreaves and Thompson's Contract* (6).

[He also referred to *Cosser* v. *Collinge* (7) and *Smith* v. *Capron* (8).]

STIRLING, J. (after stating the facts, continued):—

As to part of the application I feel no doubt at all. The property was put up for sale as business premises, and upon that it seems to me that the purchaser would be entitled to have property conveyed to him on which he could carry on any business, subject only to the restrictions imposed by the general law of the land—for example, so as not to create a nuisance—and subject also to the statutory restrictions in force with regard to any particular trade where such restrictions exist. But with these exceptions he would be entitled to expect the property to be conveyed to him free from all restrictions. What does he find? He finds that the lease under which the property is held contains a covenant in the words I have read. A question is raised as to the true construction of the covenant. It is argued on behalf of the purchaser that it is an absolute covenant not to carry on, or permit to be carried on, any trade or business on the property. On the other hand, it is contended on behalf of the vendors that an absolute covenant was not what was meant, but that these prohibitive words must be read and taken in connection with the words which follow, viz., "which shall or may be or

(1) 29 Ch. D. 661.
(2) 7 Ch. D. 555, 561.
(3) 20 Q. B. D. 523.
(4) 5 Jur. (N.S.) 117; 28 L. J. (Ch.) 173.
(5) 29 Ch. D. 1009, n.
(6) 32 Ch. D. 454, 459.
(7) 3 My. & K. 283.
(8) 7 Hare, 185.

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grow to the annoyance, nuisance, or damage of the lessors," or of certain other persons therein mentioned, "or of the tenants of the adjoining property."

It is not necessary to consider upon this application which is the true construction of the covenant. If the purchaser's construction be correct, then it is manifest that he is not entitled to carry on any trade whatever on the premises, and that is absolutely inconsistent with what he had been led to expect from the conditions. Upon the other construction, it is clear that the property in his hands would be subject to a serious restriction. In the first place, he is not at liberty to open or use any part of the premises as a public-house without the consent of the lessors; and, secondly, with respect to other trades, he is not to carry on any trade to the annoyance, nuisance, or damage of the lessors or the adjoining tenants. I take it to be clearly settled that effect must be given to the words "annoyance or damage," where they occur in a covenant in addition to the word "nuisance." I think that there is one decision in the books—*Harrison* v. *Good* (1)—to the effect that the word "nuisance" standing alone in a restrictive covenant must be read as limited to that which is a legal nuisance; but in a recent case before the Court of Appeal —*Tod-Heatly* v. *Benham* (2)—it has been doubted whether that decision is altogether correct. This, at any rate, is clear, that some effect must be given to the words "annoyance or damage;" and I therefore think that the covenant imposes serious restrictions on the purchaser with regard to the use of these premises as business premises. That being so, what are his rights? On the one hand, he is bound by the contract not to make any objection in respect of any clause, matter, or thing contained in the original lease, which this objection is. On the other hand, if the vendor seeks specific performance of the contract a Court of Equity has a discretionary jurisdiction to say whether it will compel a purchaser to take a contract under which he will get something different from that which he has been led to expect he will get. Whenever a vendor chooses to put into his conditions of sale anything which misleads the purchaser, the latter may decline to perform the contract, and may say, "this is not a

(1) Law Rep. 11 Eq. 338. (2) 40 Ch. D. 80.

contract which a Court of Equity will enforce against me." That is a different thing from saying that the title is not such a title as the vendor contracted to give him. Although a contract may be such that a Court of Equity would refuse to decree specific performance of it; yet it may be binding at law, and (as is shewn by the case of *Best* v. *Hamand* (1)) the purchaser may be unable to recover his deposit. That is material for me to consider when I come, as I do now, to the question raised by the second part of the application: viz. whether I can properly say that this is a case in which a purchaser is entitled to an order for a return of the deposit. Undoubtedly there are cases in which it has been held upon a vendor and purchaser summons that the Court has jurisdiction to direct such return, the last of those cases being *In re Hargreaves and Thompson's Contract* (2). In that case the Court of Appeal came to the conclusion that the title was bad, and held that they had jurisdiction to make an order for the return of the deposit; but Lord Justice *Lindley* carefully guards himself from being supposed to say it was an absolute rule that the Court had jurisdiction under the *Vendor and Purchaser Act* in all cases in which a purchaser might be entitled to a return of deposit. He says (3), "I have no doubt myself that the purchaser is entitled not only to have his deposit back, but to have it with interest at 4 per cent. from the time when it was paid, and also to have the costs of investigating the title. I do not think that was seriously disputed. But a doubt was raised whether this was the proper method of asserting his rights, and whether the Court had jurisdiction to make an order to the above effect under the provisions of the 9th section of the *Vendor and Purchaser Act*, 1874. The late Vice-Chancellor *Hall*, who was one of the most cautious men, thought the Court had jurisdiction, although he had some little doubt about it, and the late Mr. Justice *Pearson* took the same view, making use of the observation that if Vice-Chancellor *Hall* had made an innovation it was an extremely useful one, and he should follow it. But when we come to look at the 9th section I confess I cannot entertain any doubt about the matter, because what the Court is empowered to do is this: It is to make any

(1) 12 Ch. D. 1. (2) 32 Ch. D. 454.
(3) 32 Ch. D. 458.

STIRLING, J. 1888 *In re* DAVIS & CAVEY.

order which upon the application shall appear just, and then the applications which may be made are specified in this way: 'Applications in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract).' So that upon a summons taken out under this Act you cannot question the validity of the contract—*e.g.* you cannot raise any question whether it is fraudulent or not."

The rule at law as to the recovery of the deposit on the ground of misdescription is shewn by the case of *Flight* v. *Booth* (1), where Lord Chief Justice *Tindal* says this (2): "It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether." So that he treats fraudulent misrepresentation as a matter—to borrow the language of the Act—"affecting the validity of the contract." Then he goes on: "But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only: *Duke of Norfolk* v. *Worthy* (3); *Wright* v. *Wilson* (4); whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale: *Jones* v. *Edney* (5); *Waring* v. *Hoggart* (6); *Stewart* v. *Alliston* (7). In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so

(1) 1 Bing. N. C. 370
(2) Ibid. 376.
(3) 1 Camp. 337, 340.
(4) 1 Mood. & Rob. 207.
(5) 3 Camp. 285.
(6) Ry. & Mood. 39.
(7) 1 Mer. 26.

far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." So that even although the misrepresentation does not proceed from fraud, if it is on a material and substantial point the contract is avoided altogether. That, again, is a matter affecting the validity of the contract.

In my opinion as the purchaser bought the premises as business premises, and it is shewn by the terms of the lease that the property is held subject to a covenant imposing a serious restriction upon its use as business premises, he is entitled to a declaration that the title is not such as he ought to be compelled to accept; but he can only recover the deposit by raising a question which affects the validity of the contract, and therefore is not entitled to any further relief upon this summons. I therefore propose to make a declaration in that form. The order will be without prejudice to the right of the purchaser to bring such action as he may be advised for a return of the deposit.

It only remains to consider the question what is to be done with the costs of the summons. Although the purchaser has not been entirely successful he has succeeded to a substantial extent, and I think that the costs ought to be paid by the vendors.

Solicitors: *Lewis Davis; Alfred E. Copp, for John Watts, Plumstead.*

W. W. K.

STIRLING, J.

1888

Nov. 28;
Dec. 12.

In re GREEN.
BALDOCK *v.* GREEN.

[1882 G. 295.]

Will—Construction—"Rents, dividends, and annual proceeds," Direction to pay Debts out of—Payment of Debts out of Corpus—Liability of Executrix Tenant for Life to recoup Corpus—General Legacy—Specific Legacy.

A testator bequeathed to his wife, subject to the payment of his debts, all the cash in his house at the time of his death, and directed that in case such money should be insufficient for such payment the deficiency should be paid out of the rents, dividends, and annual proceeds of all his estate. He also specifically bequeathed property to his wife during her life, and appointed her his executrix, and she paid his debts in part out of the *corpus* of his estate:—

Held, that the words, "rents, dividends, and annual proceeds," were, having regard to the context, equivalent to "annual rents, dividends, and proceeds," and that the direction for payment of debts thereout did not create a charge upon the *corpus* of the estate; but, *held*, that as the debts had been in fact partially paid out of *corpus*, and the testator had not provided for such an event, the executrix could not be called upon to recoup the *corpus* out of the income of her specifically bequeathed property.

The principle of *Tewart* v. *Lawson* (1) adopted and followed.

The testator bequeathed a leasehold public-house upon trust for sale, and out of the proceeds of such sale, and the rents and profits until sale, he gave a legacy to *X. Y.*, and as to the residue of such proceeds, and rents and profits, and all other the residue of his real and personal estate, he gave the same to his two daughters:—

Held, that the gift of the residue of the proceeds of the sale of the public-house was not specific, but that such residue formed part of the general residuary estate of the testator.

SUMMONS to vary, and further consideration.

The testator, *James Green*, who died in March, 1879, by his will, dated in 1861, gave as follows: "I devise and bequeath to my wife *Matilda Green* (subject to the payment of my just debts, funeral and testamentary expenses) all the cash that may be in my house at the time of my decease; and also (except my gold watch and wearing apparel) all my household furniture, plate, linen, and china, and other effects and things that may be in my

(1) Law Rep. 18 Eq. 490.

house at the time of my decease, and I direct that in case the money in my house at the time of my decease shall be insufficient to pay my just debts, funeral and testamentary expenses, then that the deficiency shall be paid out of the rents, dividends, and annual proceeds of all my estate due at the time of my decease and afterwards to become due." The testator then, after a specific bequest of his gold watch and wearing apparel, gave as follows: "I give and bequeath my leasehold house known as the '*Duke of Wellington*,' situate on *Stonebridge Common, Kingsland*, in the county of *Middlesex*, and also my leasehold houses, Nos. 84 and 85 *Murray Street, Hoxton*, in the said county, subject to the rents and covenants contained in the leases under which the same are respectively held, to my said dear wife for her life; and from and after her death I give and bequeath the said house known as the '*Duke of Wellington*' to my eldest daughter *Kezia Baldock*, widow, her executors, administrators, and assigns, for the then residue of the term granted by the lease under which I hold the said premises. And from and after the death of my said dear wife I give and bequeath my said leasehold houses, Nos. 84 and 85, *Murray Street*, aforesaid, to my youngest daughter *Jemima Low*, the wife of the said *John Partridge*, her executors, administrators, and assigns, for all the then residue of the term granted by the leases under which I hold the same. I give and bequeath to my executrix and executor, hereinafter named, all my leasehold messuage or tenement known as the '*Princess Alice*,' *Murray Street, Hoxton*, aforesaid, upon trust as soon as conveniently may be after my decease to sell and dispose of the same, and all my interest therein, either by public auction or private contract, and subject to such conditions as they in their discretion shall deem expedient, for the best price that can be obtained for the same; and out of the proceeds of such sale, and the rents and profits of the said messuage or tenement until sale, I give and bequeath the sum of £100, free from legacy duty, to *Elizabeth Dovey*, of 68, *Upper John Street, Fitzroy Square*, in the county of *Middlesex*, spinster; and as to the residue of such proceeds and rents and profits, and all other the residue of my real and personal estate, I give and devise and bequeath the same unto my said two daughters, to be equally divided between them

STIRLING, J. share and share alike. I appoint my said wife and the said *John Partridge* executrix and executor of this my last will."

1888

In re GREEN BALDOCK *v.* GREEN.

In May, 1876, the testator made a codicil to his will, whereby, after reciting that since making his will he had sold the two houses named Nos. 84 and 85 *Murray Street, Hoxton*, and invested the money in *Oriental Bank* shares, he left such shares, together with certain other shares (which, however, he afterwards sold) to his wife for her life, and after her decease to be equally divided among his grandchildren.

The testator had no real estate belonging to him at the time of his death.

John Partridge disclaimed the trusts and renounced probate of the will; and the will and codicil were proved by the executrix alone, who took possession of and administered the testator's personal estate, and paid and satisfied his debts, funeral and testamentary expenses and legacies. In the course of such administration she sold the "*Princess Alice*" in June, 1879, and afterwards applied part of the proceeds in payment of the testator's debts, and invested the residue of such proceeds.

On the 1st of February, 1882, this action was brought by the legal personal representative of the testator's daughter, *Kezia Baldock*, against the executrix for the administration of the testator's personal estate; and by the judgment delivered therein on the 30th of November, 1882, the usual accounts and inquiries were directed.

The Chief Clerk made his certificate in May, 1888, and it thereby appeared that the funeral and testamentary expenses and debts of the testator, which amounted to £127 7*s.* 1*d.*, had been paid in full by the executrix; as to £59 18*s.* 8*d.* part thereof out of the sums of £6 cash in his house at the time of his death, £23 10*s.* 9*d.*, the proportion of the rents of the "*Duke of Wellington*" and "*Princess Alice*" up to the testator's death, and £30 7*s.* 11*d.*, the income of the securities on which part of the proceeds of sale of the "*Princess Alice*" had been invested, and as to £67 8*s.* 5*d.*, the balance, out of the proceeds of such sale. It further appeared that the executrix had received and applied to her own use the whole income arising from the leasehold house known as the "*Duke of Wellington*," and from the shares in the

Oriental Bank Corporation, and an investment into which those shares had been converted.

On the 27th of June, 1888, the Plaintiff took out a summons to vary the certificate by charging the Defendant, the executrix, with the further sum of £67 8*s.* 5*d.* as income received and applied by her for her own use which ought to have been applied by her towards payment of the testator's debts and funeral and testamentary expenses, together with the £6 cash in the testator's house, the £23 10*s.* 9*d.*, proportion of income to the testator's death, and £30 7*s.* 11*d.*, dividends on the investments mentioned in the certificate; and this summons and the further consideration of the action now came on for hearing together.

Hastings, Q.C., and *Brodie Cooper*, for the Plaintiff:—

The words "rents, dividends, and annual proceeds" in this will must be construed as meaning "annual rents, dividends, and proceeds": *Metcalfe* v. *Hutchinson* (1); and there is no charge of debts and funeral and testamentary expenses on the *corpus*. But even if there is, the gift of the residue of the proceeds of the sale of the "*Princess Alice*" is equivalent to a specific gift of the "*Princess Alice*," and accordingly that property must be exonerated by the general residue from the payment of debts.

[STIRLING, J.:—*Powell* v. *Riley* (2) is in your favour, but has been questioned. His Lordship also referred to *Bothamley* v. *Sherson* (3)].

W. Pearson, Q.C., and *Vernon R. Smith*, for the Executrix:—

The general rule is, that a direction in a will to pay debts out of rents and profits, charges such debts upon the *corpus*, and there is nothing in this will to take the case out of that rule.

Again, an event has happened for which the testator has not provided. The debts have been in fact paid, and, as we say, properly paid, out of the *corpus*, and an executor who is also tenant for life of specifically bequeathed property has never been held liable to recoup out of his income debts which have been paid out of *corpus*. The gift of the proceeds of the sale of the "*Princess*

(1) 1 Ch. D. 591. (2) Law Rep. 12 Eq. 175.
(3) Law Rep. 20 Eq. 304, 308.

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Alice" is clearly residuary. [They referred to *Backhouse* v. *Middleton* (1), *Wilson* v. *Halliley* (2), and *Jarman* on Wills (3).]

Hastings, in reply.

STIRLING, J. (after reading the will and stating the facts, continued):—

The first point to be determined is as to the meaning of the words "rents, dividends, and annual proceeds of all my estate." Are those words to be confined to annual income, or are they to be treated (in accordance with a series of well known authorities, of which *Metcalfe* v. *Hutchinson* (4) is one of the latest) as denoting the *corpus* of the testator's estate? The rule of construction is thus stated by Sir *G. Jessel*, M.R. (5):—"You must find on the face of the will a clear restriction of the general meaning of words directing you to raise a gross sum payable immediately, or at a day fixed, out of rents and profits; and the words are not otherwise to be read as annual rents and profits." That was a case in which the words were simply "rents and profits," and there is no doubt that the rule is settled in accordance with the statement of the Master of the Rolls. But it is easier to state the rule than to ascertain the grounds on which it is founded. In *Stanhope* v. *Thacker* (6) there was a direction to raise a sum of £3000 out of rents, issues, and profits; and the Lord Chancellor, Lord *Cowper*, is reported to have been clearly of opinion "that this £3000 being to be raised out of the rents, issues, and profits, if the ordinary or annual rents and profits of the lands would not raise the money in a convenient time to answer the intent of the settlement, which was to provide portions for the daughters; that in a Court of Equity the same might be decreed to be raised by a sale or mortgage thereof, which were the extraordinary profits of the same lands." So that the Lord Chancellor appears to have relied on the generality of the word "profits" in rents and profits.

The question before me was raised in the case of *Collier* v.

(1) 1 Ch. Cas. 173.
(2) 1 Russ. & My. 590.
(3) 4th Ed. Vol. ii., p. 610.
(4) 1 Ch. D. 591.
(5) Ibid. 598.
(6) Prec. Ch. 435, 436.

Walters (1), where the words were "rents, issues, and yearly profits." There the late Master of the Rolls did not decide the point, but in the course of the argument he appears to have expressed his opinion that those words would mean annual rents and profits only. I take the rule to be as stated in *Metcalfe* v. *Hutchinson* (2). Then the question is whether there are here sufficient words to confine the meaning of rents and profits to annual rents and profits. The words are "rents, dividends, and annual proceeds." The primary meaning of the word "rents" is rents accruing from year to year; there is no question as to the meaning of dividends; and the word "proceeds" is limited by the word "annual." Then is there in the context any indication of the sense in which the testator used those words? In the first place the testator bequeaths a specific part of his estate to his wife for life, with remainders over, in such terms as to make it clear that his meaning was that the *corpus* should be enjoyed in specie. Next he uses the words "rents and profits" in the gift of the "*Princess Alice*" in the sense of annual rents and profits, being the rents and profits until sale, plainly shewing that he did not mean what Lord *Cowper* termed extraordinary profits. Then he has in terms disposed of the residue of his real and personal estate; and if he intended to charge the deficiency of his debts on the *corpus* of his estate, why should he not have done so directly? Moreover, when the testator desires to charge the *corpus* he knows how to do so—as is shewn by the trust to raise a legacy of £100 for *Elizabeth Dovey* out of the proceeds of the sale of the "*Princess Alice*." Looking at the whole of these circumstances I am satisfied that annual rents, dividends, and proceeds only were intended by the words to which I have referred.

But this does not conclude the question. It was further contended that, assuming the true interpretation of the words to be that which I think it to be, still, in point of fact the debts, funeral and testamentary expenses have been properly paid out of the *corpus* of the testator's estate, and that there is nothing in the will which renders it obligatory on the Defendant as tenant for life of specifically bequeathed personalty to recoup the *corpus* out of her income.

(1) Law Rep. 17 Eq. 252. (2) 1 Ch. D. 591.

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I have come to the conclusion that this argument is well founded. A similar question was considered by Vice-Chancellor *Hall* in *Tewart* v. *Lawson* (1). That was a case which arose in respect of a charge of debts on real estate. There a testator devised a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life and his sons in tail, and to pay all his debts owing at the time of his decease; and he directed that the rents and profits of the estates should be received by the trustees, and be applied in liquidation of the debts until the whole should be paid, that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally disencumbered, and that the trustees should from time to time invest the moneys which might come to their hands until the same should be applied in any payment under the trusts. A receiver had been appointed, and the debts had been paid by sales of parts of the estates under orders of the Court. The Court held that the receiver must be discharged, and that there was no trust in the will to compel the tenant for life to recoup the persons entitled in remainder, and that the tenant for life must be let into possession. The Vice-Chancellor says this (2): "Upon the construction of the parts of the will which I have read, I think it clear in this case that the testator designed and contemplated that the annual rents and profits should be applied for the purpose of clearing the estate from debt in the way which he has expressed; and that it was not intended by this form of direction to authorize the trustees in any way to resort to the *corpus* for the purpose of paying the debts. On the contrary, the testator clearly, as I think, negatives that, and designs payment of the debts by applying the annual rents and profits, however long it might take. But, though that was the scheme of the testator, that scheme was necessarily subservient to the rights of the creditors to get paid in a different way. The testator does not by his will at all attempt to make any provision for that state of things arising. He leaves that to take its chance, and he creates a trust of the rents and profits to pay the debts, so that they would be paid in that way, and that way only, unless

(1) Law Rep. 18 Eq. 490. (2) Law Rep. 18 Eq. 494.

the creditors availed themselves of their legal rights to be paid in a different way, or unless in any way consistent with the law, including the administration of estates in this Court, the debts came to be paid off otherwise than in the way indicated. If we, therefore, look to the language of the will in the events which have happened, the trust has come to an end, and the debts have in fact been paid. The rents and profits were only to be applied to pay the debts until the debts were actually paid. That being the case, I am now asked in reality to create a new trust and a new scheme; to say, what might have been attempted to have been said by the testator, to the effect following:—'Provided that if any part of my estates shall be sold at the instance of the creditors or otherwise, or if the equity of redemption of any part of my estates shall be foreclosed, then I direct an accumulation of rents to go on until there shall have been got together a fund equal to the value of the property so sold, or the equity of redemption of which has been foreclosed; and such fund shall be dealt with as constituting part of the estate which is to be subject to the limitations of my will.' However, the testator has not said that; and I cannot take upon myself to say that I must read the will as if the testator had so said, seeing that that certainly would, to say the least, raise a very grave question indeed whether such a provision as that was valid." The Vice-Chancellor then refers to certain cases, and proceeds:—"But though the trust is a perfectly valid trust, so far as regards payment of the debts, it is a totally different question whether, when the trust cannot any longer be performed, and is no longer required, this Court is to create another trust to take the place of that which has come to an end—and come to an end in a manner which we must consider the testator cannot have disregarded, cannot have been ignorant of, and which if he could have provided for, we must take it he would have provided for." He goes on to consider the question of law whether such a trust would be valid, but I do not think it necessary to follow him in that discussion. The reasoning of the Vice-Chancellor appears to me to be applicable to the present case. The testator must be taken to have known that his debts after his death were payable out of *corpus*, and he has not chosen to provide for the

STIRLING, J. 1888 *In re* GREEN. BALDOCK *v.* GREEN.

event of his debts being paid in that way; and I am not at liberty to supply the omission. The debts have been properly paid out of the *corpus* of the estate, and it appears to me that there is nothing in the will which compels me to say that the Defendant must recoup the *corpus* out of the income of the property specifically bequeathed to her. I think, therefore, that the summons fails.

Then arises the question whether the gift of the residue of the proceeds of the sale of the "*Princess Alice*," "and all other the residue of my real and personal estate," is specific or not. That question appears to me to be concluded by the decision in *Fielding* v. *Preston* (1). There a testator gave all his real and personal estate upon trust to pay the rents of his freehold, copyhold, and leasehold estates, and the interest of all his stock in the public funds, to his son for life; and after his death, in the events which happened, the testator gave his freehold, leasehold, and copyhold estates to one daughter and her issue, and all his funded and other personal estate to another daughter and her issue. Lord *Cranworth*, after deciding that the gift of leaseholds was specific, says this (2): "The other question is, whether the gift of the funded property is specific. It may be said in the same way as with respect to the leaseholds, that it was absurd to speak of its being specific, when it only formed a portion of the whole, which was given to the son for his life. I cannot help thinking that if the testator were here to state his intention, he would wish this bequest also to be considered specific, but this is a matter on which I have no means of judging, and upon which, if I had the means of so doing, I should not think myself at liberty to speculate, because it is a very old rule of construction, that you cannot construe a gift by considering the amount of the personal estate, inasmuch as that may increase or diminish to any extent during the life of the testator. My mind has fluctuated on this point, but at last I have arrived at the conclusion that this is not a specific gift of the funded property, and I come to that conclusion, because I think it would be very dangerous to hold that in a will where there is a gift of residue, and the testator unnecessarily chooses to enumerate some particular things

(1) 1 De G. & J. 438. (2) 1 De G. & J. 444.

in that residuary gift, such a circumstance was sufficient to constitute the things so enumerated specific gifts. It rarely happens, that in the gift of a residue, something is not mentioned specifically. For instance, a testator may give his horses, and all his other personal estate or his stock in trade, and the rest of his personal estate. Such bequests could not, I think, be properly held to be specific. Suppose the will to be worded thus: 'I give to *Henrietta*, her executors, administrators, and assigns, all my other personal estate, including my funded property.' That would not have been specific, and it would be introducing refinements that are much to be avoided to make any distinction between such words and those which I previously suggested as instances of a different form of expression." The hypothetical case thus put has quite recently formed the subject of decision by the Court of Appeal in *In re Tootal's Estate* (1), and *Macdonald* v. *Irvine* (2). In both those cases the gift was held not to be specific. Therefore I am bound to hold that the gift of the residue of the proceeds of the "*Princess Alice*" is not specific.

Solicitors for Plaintiff: *Marsden & Son.*
Solicitors for Defendant: *W. H. Waller & Son.*

(1) 2 Ch. D. 628. (2) 8 Ch. D. 101.

W. W. K.

STIRLING, J. *In re* CALIFORNIAN FIG SYRUP COMPANY'S TRADE-MARK.

1888

Dec. 7.

Patents, Designs, and Trade Marks Act, 1883, *s.* 103, *Construction of—Application by Foreigner to register Trade-Mark which had been registered in his own Country—Period within which Application should have been made—International Convention for Protection of Industrial Property.*

A company had, in *America*, where they had carried on business, registered a trade-mark in 1885. The *Patents, Designs, and Trade Marks Act* was passed in August, 1883, and sect. 103 enacted that if Her Majesty was pleased to make any arrangement with a foreign state for the mutual protection of trade marks, then any person who had applied for protection of a trade-mark in such foreign state should be entitled to registration under the Act, provided that the application was made within four months from applying for protection in the foreign state.

The International Convention for the Protection of Industrial Property was signed in *Paris* in March, 1883, and it contained a provision that every trade-mark registered in the country of origin should be admitted to registration, and protected in all countries of the Union.

The Convention was in March, 1884, acceded to by the Government of *Great Britain*, and in July, 1887, by the Government of *America*, and the provisions of sect. 103 of the Act were by an Order in Council in July, 1887, made applicable to *America*.

In February, 1888, the company applied to the Comptroller-General to register their trade-mark under the provisions of sect. 103, and of the International Convention; and he refused to do so:—

On appeal to the Court,

Held, that the application for registration could be dealt with only under the provisions of the Act of 1883; and that as it was not made within four months as required by the provisions of sect. 103, it must be refused.

Semble, that the provisions of the Convention of 1883, which stated that every trade-mark duly registered in the country of origin should be admitted for registration and protection in the form originally registered in all the countries of the Union, now bound *Great Britain*, but that the Act of 1883 did not afford the means of carrying out the provisions of the Convention.

THE *Californian Fig Syrup Company* had carried on business at *San Francisco*, and various other places in the *United States of America*, and in 1879 they began to use the words "*Syrup of Figs*" as a trade-mark.

On the 20th of March, 1883, the International Convention for the Protection of Industrial Property was signed in *Paris*, on

behalf of *France, Belgium*, and other states. It contained a provision that other states should be permitted to adhere to the Convention at their request.

The Convention contained, amongst others, the following provisions:—

"II. The subjects or citizens of each of the contracting states shall, in all other states of the Union, as regards patents, industrial designs or models, trade-marks and trade-names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

"Consequently, they shall have the same protection as the latter, and the same legal recourse on any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each state.

"IV. Any person who has duly registered an application for a patent, industrial design or model, or trade-mark in one of the contracting states, shall enjoy, as regard registration in the other states, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

"Consequently, subsequent registration in any of the other states of the Union before expiry of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by registration, by publication of the invention, or the working of it by a third party.

"The above-mentioned terms of priority shall be six months for patents, and three months for designs, models, and trade-marks. A month longer is allowed for countries beyond the sea.

"VI. Every trade-mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the Union.

"That country shall be deemed the country of origin where the applicant has his chief seat of business.

"If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin.

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"Registration may be refused if the object for which it is solicited is considered contrary to morality or public order."

The plenipotentiaries of the contracting states at the time of signing the Convention signed also a protocol, which, it was declared, should have the same force and solidity as the Convention itself. The 4th paragraph of the protocol stated that:—

"Paragraph 1 of Article VI. is to be understood as meaning that no trade-mark shall be excluded from protection in any state of the Union, because it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that state, provided that on this point it comply with the legal requirements of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and otherwise reserving the clauses of the other articles of the Convention, the internal legislation of each state remains in force.

"To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be taken to be contrary to public order in the sense of the last paragraph of Article VI."

The *Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. c. 57), was passed on the 25th of August, 1883, but it was enacted that the Act (sect. 3): "Except where it is otherwise expressed, shall commence from and immediately after the 31st day of December, 1883." By sect. 103 it was enacted:—

"(1.) If Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign state or states for mutual protection of inventions, designs, and trade-marks, or any of them, then any person who has applied for protection for any invention, design, or trade-mark in any such state, shall be entitled to a patent for his invention or to registration of his design or trade-mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the protection obtained in such foreign state.

"Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade-mark within four months, from his applying for protection in the foreign state with which the arrangement is in force.

"Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade-mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade-mark in this country, as the case may be.

"(3.) The application for the grant of a patent, or the registration of a design, or the registration of a trade-mark under this section, must be made in the same manner as an ordinary application under this Act: Provided that, in the case of trade-marks, any trade-mark the registration of which has been duly applied for in the country of origin may be registered under this Act:

"(4.) The provisions of this section shall apply only in the case of those foreign states with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each state as the Order in Council shall continue in force with respect to that state."

By sect. 6 of the *Patents, Designs, and Trade Marks Amendment Act*, 1885 (48 & 49 Vict. c. 63), sub-sect. 1 of sect. 103 was amended by substituting the words "date of the application" for the words "date of the protection obtained."

On the 17th of March, 1884, the Convention was acceded to by the Government of *Great Britain*.

On the 14th of February, 1885, the *Californian Fig Syrup Company* sent in an application for the registration of their trade-mark in the *United States of America*, and on the 14th of April, 1885, the application was granted.

By an Order in Council dated the 12th day of July, 1887, it was declared that the provisions of sect. 103 of the *Patents, Designs, and Trade Marks Act*, 1883, should be applicable to the *United States of America*.

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On the 30th of July, 1887, the Convention was acceded to by the Government of *America*.

On the 23rd of February, 1888, the company sent in an application to the Comptroller-General for registration of the words "*Syrup of Figs*" as a trade-mark under the *Patents, Designs, and Trade Marks Act*, 1883, and he refused the application, on the ground that, in his discretion, which he was allowed to exercise, the trade-mark was not a fancy word; and also that the application to him was not made within the four months after the application made by the company in *America*. The company appealed to the Board of Trade, on the ground that they were entitled to registration under the provisions of sect. 103 of the Act, and under the provisions of the Convention of March, 1883, and the Board of Trade referred the appeal to the Court. This was a motion on behalf of the company, in the matter of the Act of 1883, for an order upon the Comptroller-General directing him to proceed with the registration.

Hastings, Q.C., and *John Cutler*, for the motion:—

The company had duly complied with the rules in force in the country of origin of the trade-mark, and obtained registration, and they are, under sub-sect. 3 of sect. 103 of the Act of 1883, entitled to have their trade-mark registered in this country; and whether the application for registration was made in this country within four months, or even four years, after the date of their application for protection in *America*. There is no claim of priority in this case. The sub-section deals only with trade-marks. The 103rd section should be read in such a way as to make it harmonize with the provisions of the Convention, which stated that every foreigner should be entitled to register his trade-mark. The proviso of sub-sect. 3 ought to be read as a substantive enactment, and not as governed by the 1st proviso of sub-sect. 1, otherwise old and valuable trade-marks which had been registered in *America* before the Order in Council of July, 1887, would not obtain the protection in this country which under the Convention of 1883 they are obviously entitled to. The Court should endeavour to put such a construction upon the Act as would give a foreigner the same advantage which the

Convention has given him. The Comptroller-General has no discretion in the matter.

Sir *R. Webster*, A.G., and *Ingle Joyce*, for the Comptroller-General:—

The company has no right to registration under sect. 103, because their application was not made within four months from the date of application for protection in *America*. The Court cannot look at the Convention, except to notice the provisions of sect. 103 in regard to foreign states, and the Order in Council of July, 1887. It was never intended to give any right to owners of trade-marks in regard to trade-marks which might have been in existence say for fifteen or twenty years. The 1st proviso to sub-sect. 1 distinctly enacted that no application for registration should be entertained under it unless it should be made within the four months after the registration in the country of origin. This is not a trade-mark in respect of which protection was given by the Act. It was not the intention of the Legislature to allow all the world to come here and register any trade-mark: *Re Rivière's Trade-mark* (1). The motion ought to be refused.

Hastings, in reply.

STIRLING, J.:—

This is an application by subjects or citizens of the *United States of America*, who carry on business in that country, for the registration of a trade-mark under the 103rd section of the *Patents, Designs, and Trade Marks Act* of 1883, which I have now to construe. Sub-sect. 1 enacts, reading it shortly, that "if Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign state or states for mutual protection of . . . . trade-marks . . . . then any person who has applied for protection for any . . . . trade-mark in any such state shall be entitled to . . . . registration of his . . . . trade-mark . . . . under this Act, in priority to other applicants; and such . . . . registration shall have the same date as the date of the application" (I read the Act as amended by the Act of 1885) "in such

(1) 49 L. T. (N.S.) 506.

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foreign state. Provided that his application is made, in the case of a . . . . trade-mark, within four months from his applying for protection in the foreign state with which the arrangement is in force." Now it seems to me that that is plain enough. At the time when the Act was passed, in August, 1883, there was no Convention or arrangement between the English Government and the Government of any foreign state as to the mutual protection of any of the matters which are mentioned in the 103rd section; but a Convention had, in the month of March, 1883, been entered into by certain foreign states, and it was contemplated that other Governments would accede to it. At that time the Government of her Majesty the Queen had not acceded to that Convention or any other. Now the sub-section is perfectly hypothetical. It does not in terms refer either to that Convention or any other Convention. It provides that if an arrangement is come to, "any person who has applied for protection for" his trade-mark in a foreign state "shall be entitled . . . . to registration of his . . . . trade-mark . . . . under this Act, in priority to other applicants;" provided his application is made, in the case of a "trade-mark within four months from his applying for protection in the foreign state." I cannot see that there is any doubt as to the meaning of the proviso. It makes it essential that the applicant shall apply within four months from the time of his applying for protection in the foreign state with which the arrangement is in force. I pass on to consider sub-sect. 3, which enacts that "the application for the . . . . registration of a trade-mark under this section must be made in the same manner as an ordinary application under this Act." Again I can see no ground for doubt that the words "application under this section" refer to what is mentioned in the prior part of the 103rd section and nothing else. Then comes the proviso which gives rise to the question, and it is: "Provided that, in the case of trade-marks, any trade-mark the registration of which has been duly applied for in the country of origin may be registered under this Act." Reading that proviso in the ordinary way, and applying to it the ordinary rules of construction, it is simply a qualification of the previous part of sub-sect. 3; and the previous part of that sub-section having enacted that the application "must

be made in the same manner as an ordinary application under the Act, the proviso goes on to relieve the foreigner who applies in this country for registration from certain of the liabilities of subjects of this country, and provides that "any trade-mark, the registration of which has been duly applied for in the country of origin, may be registered under this Act." I am not going further in this case than is necessary for a decision of the particular point before me, and I am not going to express any opinion as to how far that proviso extends, or from what liabilities it emancipates a foreigner; but it seems to me that, upon the true construction of that proviso, it is simply a qualification of the preceding part of the clause, and does not give an independent or new right of registration under the Act. That being so, I am of opinion that the present Applicants not having made their application within four months from their applying for protection for their trade-mark in the *United States of America*, and the Crown, through the Attorney-General, insisting on the objection, the application for registration fails.

But I must notice the argument which was addressed to me, and was founded on this: that the Convention which was entered into in March, 1883, between certain states, but to which her Majesty was not at that time a party, does apparently provide in art. 6, that every trade-mark duly registered in the country of origin shall be admitted for registration and protection in the form originally registered in all the countries of the Union. By that article her Majesty is now bound. Certainly, according to my construction of the Act, the Act does not afford the means of carrying out that article, and it will be for her Majesty's Government to consider, and seeing the Attorney-General here, I have no doubt that they will consider, what legislative steps ought to be taken to give effect to that article, if necessary. But with that I have nothing to do. I have simply to consider this question; dealing as I am with, and being bound by, a statute of this realm, whether I can give it a different interpretation from that which I should otherwise give it, simply because at the date of the passing of the Act, the Convention had been entered into between certain foreign states, and it was within the bounds of possibility that her Majesty might

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afterwards accede to it, and several years afterwards, in point of fact, her Majesty did accede to it. I am of opinion that I cannot do so. I do not think that the Crown ought to ask for costs. The application was refused without costs.

Solicitors: *Gresham & Davies*; *The Solicitor to the Board of Trade.*

T. F. M.

STIRLING, J. 1888 *Dec.* 20; 1889. *Jan.* 15.

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[1849 B. 62.]

Costs—Taxation—Attempted Sale by Auction—Auctioneer paid by Client—Lump Sum—"Commission"—Subsequent Sale by Private Contract—Scale Charges—Solicitors' Remuneration Act, 1881—*General Order, August*, 1882, *rr.* 2 (*c*), 4, *Schedule I. part* 1, *rr.* 2, 11.

Before the General Order under the *Solicitors' Remuneration Act*, 1881, came into operation, property which was the subject of an administration action was offered for sale by auction and bought in, the auctioneer's remuneration for the attempted sale being paid by the client in a lump sum.

After the Order came into operation the property was sold by private contract.

The same solicitors acted throughout, and they made out their bill of costs as to the attempted sale by auction, under the old system, and as to the sale by private contract, under the old system, as altered by Schedule II. to the General Order.

The Taxing Master, in taxing this bill, disallowed all the charges other than disbursements contained therein with regard to the attempted sale by auction, and with regard to the sale by private contract; and he substituted for the latter the scale charges for negotiating the sale, and for deducing the title and perusing and completing the conveyance.

Held, that the Taxing Master had taxed the bill upon a wrong principle, and that the bill must be referred back to him to be dealt with upon the principles laid down by the House of Lords in *In re Newbould* (1).

The word "commission" in rule 11 of Schedule I. part 1, must be construed as including a lump sum paid by the client to the auctioneer as his remuneration.

MOTION.

In the course of the proceedings in this action, which was brought against the executors and trustees of the testator for the

(1) W. N. 1888, p. 228; since reported 14 App. Cas. 1.

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administration of his real and personal estate, certain parts of such real estate were, with the sanction of the Court, put up by the Defendants for sale by auction in the month of February, 1882. The sale, however, proved abortive.

On the 1st of January, 1883, the General Order under the *Solicitors' Remuneration Act* came into operation, and subsequently, in July of the same year, negotiations took place which resulted in an agreement for the sale of the property for £412, which sale was carried into effect under the direction of the Court in the month of November following. The same firm of solicitors acted throughout all these transactions, and the question upon this application arose with reference to the bill of costs delivered by them to the Defendants in respect thereof.

Upon the occasion of the attempted sale by auction the auctioneer was remunerated by a lump sum of £3 3*s.*, which had been sanctioned in Chambers, and was paid to him, not by the solicitors, but by the clients. In the solicitors' bill the costs of the attempted sale by auction in February, 1882, were charged in detail under the old system; and the costs of the sale which was effected by private contract in 1883 were charged in detail under the old system, as altered by Schedule II. of the General Order pursuant to the *Solicitors' Remuneration Act*, 1881.

In taxing the Defendants' costs the Taxing Master disallowed the whole of the solicitors' charges relating to the attempted sale by auction, and also the items relating to the sale by private contract, and substituted for the latter the scale charges under Schedule I. of the General Order, viz., £6 15*s.* for negotiating the sale, and £4 10*s.* for deducing the title and perusing and completing the conveyance.

A motion was now made by the Defendants, asking in substance that the bill of costs in question might be referred back to the Taxing Master for reconsideration.

The following are the rules material to the question:—General Order, rule 4: "The remuneration prescribed by Schedule I. to this Order is not to include . . . . auctioneers' or valuers' charges. . . . ."

Schedule I. Part 1, rule 2: "The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of

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the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale; and for each subsequent sale ineffectually attempted, he is to charge according to the present system, as altered by Schedule II. hereto. In case of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one half of the commission previously allowed on the first attempted sale. The provisions of this rule as to commission on sales or attempted sales by auction are to be subject to rule 11."

Rule 11: "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. . . ."

S. Hall, Q.C., and *E. S. Ford*, for the Defendants, in support of the motion:—

The Taxing Master has taxed the costs upon a wrong principle. Here, by the operation of Schedule I., part 1, rule 11, the scale charges for conducting a sale by auction are excluded; and according to the true construction of the General Order and the rules, where the scale charges are inapplicable, so that the business is "business the remuneration for which is not" provided for or prescribed within the meaning of rule 2 (*c*) of the order, the solicitor is entitled to be remunerated according to the old system, as altered by Schedule II.: *In re Newbould* (1); *In re Faulkner* (2).

Kirby, for the Plaintiffs:—

The system of taxation adopted by the Taxing Master is correct, for part of rule 2 of Schedule I., part 1, is applicable to the costs of the abortive sale by auction, and of the sale afterwards negotiated and carried out by private contract, and that

(1) W. N. 1888, p. 228; since reported 14 App. Cas. 1. (2) 36 Ch. D. 566.

part of that rule is not abrogated by rule 11. The expression "commission" in rule 11 means "percentage," and is not applicable to a case like the present.

Farwell, for other parties.

Hall, in reply.

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This was a motion asking, in substance, to refer back to the Taxing Master for reconsideration a bill of costs which, as is contended by the Applicants, he has taxed on a wrong principle. [His Lordship then stated the facts, and continued:—]

The principle on which the Taxing Master has acted was that laid down by the Court of Appeal in *In re Newbould* (1), where Lord *Esher*, M.R., in the course of his judgment (2), expressed himself thus: "I am of opinion that it is impossible to see any ground for making a distinction between sales and leases, having regard to the terms of the 1st clause of General Order 2, in which the same words—'business connected with'—are applied to both. It cannot be doubted that the business in question here was business connected with the sale. The solicitor, therefore, is only entitled to be paid according to the scale in Schedule I. part 1. If he can bring himself within any part of that scale he is entitled to fees according to that scale. If he cannot, he is not entitled to be paid anything."

That case was taken to the House of Lords. The notice of motion in this case was given some time ago, but the application stood over until the result of the appeal to the House of Lords, in *In re Newbould*, had been ascertained. The House of Lords have now considered that appeal, and have reversed the decision of the Court of Appeal. I find from the prints which have been furnished to me of the speeches which were made by the noble Lords who advised the House on that occasion, that each one of them repudiated the construction which had been put by the Court of Appeal upon the *Solicitors' Remuneration Act*, and the Order under it with reference to sales.

(1) 20 Q. B. D. 204. (2) 20 Q. B. D. 208.

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Lord *Halsbury*, L.C., says: "The simple proposition appears to me to be that whenever you have established scale work you must recover, and can only recover, scale charges. With that exposition of the statute, it seems to me that the statute is simple enough in its enactments, leaving uncovered anything except that to which by the statute, and by the General Orders and rules made thereunder, the scale applies."

Lord *Watson* puts it thus: "The effect of the General Order, when read together with the schedules and with the rules, appears to me to be simply this, that solicitors employed to sell property who do not avail themselves of the provisions of article 6 of the Order, become entitled to remuneration according to the existing system as altered by Schedule II., except in the case of professional work to which Schedule I. applies, and for which a scale fee is payable in terms of that schedule."

Lord *Macnaghten* says: "I cannot agree with the Court of Appeal that there is no distinction to be found in the Remuneration Order between the treatment of business connected with sales and the treatment of business connected with leases. It appears to me that there is a very marked and a very important distinction. All the business connected with a lease, from the commencement of the transaction down to its completion, is treated as one single operation to be remunerated by one charge. The business connected with a sale (whether the sale be by private contract or public auction) is divided into stages or parts. There is the preliminary stage, which extends no farther than the making of the contract of sale. There is the final stage, which covers the deduction of title and the perusal and completion of the conveyance, and includes (as more properly belonging to that stage of the transaction) the preparation of the contract, or conditions of sale, if any. For each of these two parts of the business a separate charge is prescribed in the scale schedule. If a solicitor is within the scale as regards one of these parts, is he not to be remunerated for his services in regard to the other part of the transaction unless he can bring himself within the scale as regards that part also? That is the whole question. There is some obscurity in the language of the Order. No doubt it would have been clearer if, in the scale schedule

a note had been appended in the first column to the effect that when the scale did not apply the solicitor's remuneration in respect of business which would be carried by the scale fee if the scale applied, was to be regulated according to the old system as altered by Schedule II. But that is, I think, the true effect of the Order when the scale schedule is read in connection with clause 2 of the Order and its sub-sections, and with rule 11. I am therefore of opinion that Mr. Justice *North* was right, and that these appeals ought to be allowed." That reference to Mr. Justice *North* relates not to the case before the House of Lords, but to the view which he took in the case of *In re Faulkner* (1), which was supposed to be overruled by the decision in the Court of Appeal of *In re Newbould* (2).

Having regard to these judgments, it is quite clear that the Taxing Master went on a wrong principle in taxing this bill, and that it must go back to him. But in addition to that, I was invited to consider further the principle on which the Taxing Master ought now to tax this bill.

It was said that the whole matter was governed by the scale, and this contention was founded on one of the provisions in rule 2 in Schedule I., Part I., of the General Order under this Act. That portion of the rule runs thus: "When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale." On behalf of the persons interested in this property and the Respondents on this motion, it was argued that the case was governed by this clause of rule 2, and consequently that the solicitor was entitled to commission according to the scale on the reserved price when the property is not sold, and half of the commission for negotiating the sale. To this it was answered that rule 2 must be read in connection with rule 11 of the same part of the same schedule. "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." And the reply was, that in the first place rule 11 was not to

(1) 36 Ch. D. 566. (2) 20 Q. B. D. 204.

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be read as governing rule 2; and, secondly, that in this case no commission was paid.

The second of these contentions involves a question of fact, and the facts are not very clearly before me; but there are two points which I understand to be conceded, viz., first that the auctioneer was paid a lump sum, and not a percentage, and secondly, that the payment was not made by the solicitors; and the question is whether rule 2, or any part of it, applies, so that the case is governed by the scale.

Both the points raised by the Respondents were considered by the Court of Appeal in *In re Wilson* (1). In that case, which occurred in Lunacy, there was an order made for the taxation of the costs of the petitioner and next-of-kin of certain proceedings in the lunacy, including an attempted sale by auction of certain real estate of the lunatic. The auctioneer was paid a fee of £5 5*s.* for his services, which was allowed against the estate, that being a lump sum. The case was decided on another point, but the point which came before me was clearly raised, and there were expressions of opinion upon it by the members of the Court of Appeal. One of the objections taken was this, that the solicitor ought to be allowed his bill according to the scale, and the Taxing Master made this observation: "The 'conducting' scale charge is only applicable when the solicitor 'conducts' the sale. In this case an auctioneer is employed and paid by the client, also a surveyor, to set out the lots, value them, and generally advise as to value. The auctioneer is paid £5 5*s.*, the surveyor £31 10*s.*, both by the client. I have allowed the solicitor a fee of £2 2*s.* for instructing the surveyor and auctioneer, also a fee of £3 3*s.* in respect of the particulars, &c." Among the reasons annexed to the objections was this: "that no commission had been paid by the client to an auctioneer, for that 'commission' in the rules applied only to a percentage." To that the Taxing Master replied, "If this contention is to prevail the solicitor has only to fix a 'fee,' whether large or small, and then say no commission was paid, and have a conducting fee. It is a common case with solicitors to charge the conducting fee according to the scale, and pay a small fee to an auctioneer; but then the auctioneer's

(1) 29 Ch. D. 790.

fee must be paid by the solicitor, not the client, who in this case pays an auctioneer and surveyor also." Further on, he said: "I have never known a case in which the solicitor has been allowed the conducting fee when the client paid the auctioneer, as in this case."

The case was argued by Mr. *Neville*, and he put it very strongly: "Rule 4 says that the solicitor is to have a percentage and that auctioneer's charges are not to be included." That is not rule 4 under the schedule, but rule 4 under the Order. "The Taxing Master considered that rule 11 of the rules to Part I. of the 1st schedule governed the case; but that rule only applies to a case where commission is paid by the client to the auctioneer, and here there was not a commission, but only a small fixed charge for the actual conducting the sale in the auction room. If rule 4 does not apply to a small fixed charge like that, to what does it apply?" That is exactly the point which is raised in the present case. After consideration the Court of Appeal decided the case on another ground, but Lord Justice *Cotton* says this (1): "The Taxing Master gives as one of the reasons for his conclusion that the *ad valorem* payment can never be allowed to the solicitor when the client pays the surveyor and auctioneer. It is hardly right to give an opinion on that point, as we decide the case on another ground, and I do not mean to give a concluded opinion on it till some case comes on where it is necessary to decide it. Rule 4 would give the percentage to the solicitor though there was a payment to the auctioneer, but the 11th of the rules to Part I. of Schedule I. specifically applies to a sale by auction, and I am disposed to think the Taxing Master right in his view that the case is governed by the latter rule." Lord Justice *Lindley* says (2): "I am of the same opinion. There is a difficulty in construing rule 4, which is general, along with the 11th of the rules of Schedule I., Part I., which is specific; but I understand the practice to have been to treat the latter rule as controlling the general one, and I am disposed to think this practice right."

That is not a decision, I agree, of the Court of Appeal, but it is an expression of opinion on the facts as they then stood, and

(1) 29 Ch. D. 794. (2) 29 Ch. D. 795.

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the argument which was submitted to the Court, which is of the greatest weight. The point was put as clearly as possible by the learned counsel, and notwithstanding his argument the Lords Justices expressed their opinion in favour of the practice as laid down by the Taxing Master. I can only say that I have heard nothing sufficient to induce me to come to another conclusion. On the contrary, if I am to express an opinion upon it I think that the view taken by the Taxing Master in the case of *In re Wilson* (1) was the right one. I, therefore, can only send back this bill to be reconsidered by the Taxing Master, having regard to the rule which is laid down by the House of Lords in the case of *In re Newbould* (2). By that rule the Taxing Master must govern himself, and when it goes back to him I desire that he shall consider not only the particular items with which I have been dealing, but the whole bill.

As regards the costs of the application, the Applicants in any event must have their costs in the taxation, and the costs of the Respondents will be costs in the action.

Solicitors for Applicants: *Phelps, Sidgwick, & Biddle,* agents for *Sale, Seddon & Co., Manchester.*

Solicitors for Plaintiffs: *Harrison & Robinson.*

Solicitors for other Respondents: *Pritchard, Englefield & Co.,* agents for *Storer, Taylor & Co., Manchester.*

W. W. K.

(1) 29 Ch. D. 790. (2) W. N. 1888, p. 228; since reported 14 App. Cas. 1.

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HILL *v.* SPURGEON.

[1881 L. 2191.]

STIRLING, J.
1889
Jan. 16, 22.

Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August* 1882, *r.* 6—*Right to elect—Pending Business.*

The right of a solicitor under rule 6 of the General Order in pursuance of the *Solicitors' Remuneration Act*, 1881, to elect that his remuneration shall be according to the old system as altered by Schedule II., may be exercised as to business pending at the time when the Order came into operation, and in such case the election may be made after the time when the Order came into operation, but must be made before any further work is done by the solicitor to which the scale charges, under the Order, would apply.

The judgment in an administration action contained no general direction for the sale of the testator's real estate, but under various separate orders made in the action, and before the Order under the *Solicitors' Remuneration Act* came into operation, sales and leases of parts of such estates were directed or sanctioned. After the Order came into operation, the Plaintiff's solicitor gave him notice that in all matters relating to the estate he proposed to charge according to the old system as altered by Schedule II.

In determining the sufficiency of this notice, it was *held* that the separate transactions ought in the taxation of the costs to be treated and dealt with as separate matters, and that the business ought not to be deemed to be "undertaken" until the time arose at which the solicitor had done some work after the Order came into operation which would be covered by the scales under the General Order.

ADJOURNED SUMMONS.

In this action, which was brought on the 8th of August, 1881, by one of the executors and trustees of the will of *William Love*, against the other executor and trustee, who was also the residuary legatee, for the administration of the real and personal estate of the testator, judgment was given on the 14th of January, 1882, and thereby certain accounts and inquiries were ordered, but no directions were given for the sale of the real estate.

The action came on for further consideration on the 30th of January, 1885, and by the order then made (as subsequently varied by the Court of Appeal) directions were given for the taxation of the costs of the Plaintiff and Defendant as between solicitor and client, including in such costs any charges and expenses properly incurred by them respectively in or about the

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administration of the estate of the testator, or the execution of the trusts of his will, beyond their respective costs of the action; and the order further directed that certain specified properties should be sold with the approbation of the Judge, and that the Plaintiff should have the conduct of such sale.

In the meantime, between the date of the judgment and that of the order on further consideration, the Court had by various orders made in the action either directed or sanctioned the sale or lease of various portions of the testator's real estate.

The conveyancing business connected with the sales and leases so directed or sanctioned was conducted by the solicitor of the Plaintiff, and the charges in the Plaintiff's bill of costs relating to such conveyancing business were separately taxed by the Master under the order on further consideration.

The *Solicitors' Remuneration Act* was passed on the 22nd of August, 1881. The General Orders made in pursuance of that Act were issued in August and published in September, 1882, and came into operation from and after the 31st of December, 1882.

The above-mentioned conveyancing business was in every instance undertaken and commenced before the date when the General Order under the *Solicitors' Remuneration Act*, 1881, came into operation, and part of such business was undertaken and commenced before the date of the judgment in the action.

The General Order aforesaid provides, in rule 6, that in all cases to which the scales prescribed in Schedule I. thereto shall apply, "a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order."

On the 2nd of January, 1883, the Plaintiff's solicitor, Mr. *Henry D. M. Page*, handed to the Plaintiff a letter bearing that date, in the following terms:—

"Dear Sir,

"*Love* deceased.

"As you may possibly be aware, the rules under the *Soli-*

citors' Remuneration Act came in force yesterday, and unless notice be given solicitors must now charge for all conveyancing work by commission. This would be a very inconvenient and almost impossible way of charging in this case. I therefore beg to give you the formal notice required by the rules that in all matters relating to this estate I propose to charge my costs under Schedule II. of those rules.

"Yours faithfully,
"*Henry D. M. Page.*

"*W. B. Hill*, Esq."

The conveyancing charges of the Plaintiff's solicitor were accordingly made under the old system as altered by Schedule II., but the Taxing Master in taxing them under the order on further consideration held that the Plaintiff's solicitor was not entitled to costs so made out, and taxed his charges according to the scale in Schedule I., Part I., of the Order under the Act of 1881.

The Plaintiff then carried in objections to the taxation, and submitted that the letter of his solicitors, dated the 2nd of January, 1883, was an effectual notice of election in compliance with rule 6 of the General Order, and that the solicitor was entitled to charge and to have his conveyancing costs taxed according to the old system, as altered by Schedule II.

The Taxing Master overruled the Plaintiff's objections, and gave his reasons for so doing at considerable length. It appeared that he was under the impression that the judgment of the 18th of January, 1882, had directed the sale of all the testator's estate, and his reasons were, in effect—first, that the Plaintiff's solicitor was too late in giving notice of his election, because, even if he could elect as to pending matters, he ought to have given the notice as soon as possible after the General Order was issued, or at all events not later than the day it came into operation; and secondly, that the letter of the 2nd of January, 1883, was not in point of form a sufficient and proper notice, having regard to the fact that the client was a trustee; and he made the following statement: "The following are the facts in the case which appeared to me sufficient to render the notice of election too

STIRLING, J. late. They relate to matters commenced after the Act and before the Orders:—

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"1. As to the sale of *Caledon House*. This had been in progress from the 10th of December, 1881, and there are various charges relating to this during the months of September, October, and December, all after the Orders were made; and on the 1st of January, the day on which the Orders came into operation, and the day before the letter communicating the election was written, a letter was written on this business to the solicitors of the Plaintiff's co-trustee, and another letter was also written on this day to the purchaser's solicitors.

"2. The sale of *Stanley Villas* to the *Star Life Assurance Society*. This commenced in December, 1881, and there are charges in September, October, November, and December, 1882, and, as in the last case, a letter written on the 1st of January, 1883.

"3. The lease of *Cromer House* to Mr. *Saltmarsh* commenced in October, 1882, after the General Orders were made, and concluded in November, before they came into operation.

"4. Two leases granted to the trustees of the testator's will, commenced in June, 1882, after the Orders were made, and the charges for perusing the drafts are on the 2nd of January, 1883, the day after the day on which the Orders came into operation, and on the same day that the letter was written communicating the election.

"5. The sale of *Bonnington House* commenced April, 1882, and completed in July, 1884, and there are charges in September, October, November, and December. On the 31st of December, 1882, a letter was written on the subject of the sale, and on the 2nd of January, the day on which the notice of election was given, another letter was written.

"6. Lease to *Bell*. Commenced July, 1882, and completed in November, 1883. There are charges in September, October, November, and December, and then one for an attendance in January, 1883, without a date, but the next item is the 4th of January.

"It therefore appears that much conveyancing business was done between the making of the Orders and their coming into operation, and continued on the day they came into operation

and the following day, on the last of which the notice of election was given. It will be observed that the notice to the client of election applies generally to all matters relating to the estate, and consequently, if too late as regards any matter, it was too late for all."

The Plaintiff then took out a summons that his objections to the taxation might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly, and this summons was now adjourned into Court.

E. Ford, for the Plaintiff, in support of the summons:—

The question which the Court has to decide is, whether an election by a solicitor made, under rule 6 of the General Order in pursuance of the Act of 1881, immediately after the 1st of January, 1883, when that Order came into operation, is valid and sufficient with regard to business then pending. A solicitor is empowered by that rule to elect "before undertaking any business" that his remuneration shall be according to the old system as altered by Schedule II.; and it has been held in *In re Field* (1) that the General Order applies to business commenced before it came into operation. In that case the solicitor had not declared his election that his remuneration should be according to the old system as altered by Schedule II.; and Lord Justice *Cotton*, in the course of his judgment, said: "It may be that if a solicitor, after the rules came into operation, gave notice that he elected to have remuneration for business then pending according to the old system as modified by Schedule II., we should hold such a notice effectual. Here the solicitor did nothing of the kind, for he claimed percentage under the rules, and we cannot get out of sect. 7. It has been decided in *In re Lacey & Son* (2) that the rules apply to pending business."

In the present case the business was in every instance begun before the 1st of January, 1883, and the solicitor exercised his right of election on the 2nd of January, 1883. So far as time is concerned the right was properly exercised, for the time to exercise a right must be after the rule which gives the right has

(1) 29 Ch. D. 608, 614. (2) 25 Ch. D. 301.

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come into operation, and the day after that happened was surely a reasonable time for giving the notice. Moreover, the notice was sufficient in point of form, for the word "propose" was equivalent to "elect." Again, although the notice covered conveyancing business done under the various orders made in the action, there is no difficulty in treating separately the business done under each separate order, and the election was at any rate valid in the cases where no work was done after the rules came into operation. The business connected with the case of *Cromer House* was finished, except as to taxation, before the 1st of January, 1883, and consequently was not "pending business" at that time.

S. Dickinson, for the Defendant:—

Under rule 6 a solicitor can only elect "before undertaking any business." Here all the business was undertaken before the delivery of the letter which is relied upon as constituting the election—and also before the rule 6 came into operation. The wording of that rule is distinct, and the observations of Lord Justice *Cotton* in *In re Field* (1), which do not amount to a *dictum*, but only put a hypothetical case, cannot be taken as abrogating the rule.

[He referred to *Humphreys* v. *Jones* (2).]

E. Ford, in reply, cited *Fleming* v. *Hardcastle* (3); *In re Lacey & Son* (4); *In re Allen* (5); *Hester* v. *Hester* (6).

1889. Jan. 22. STIRLING, J.:—

This is a summons raising questions not altogether free from difficulty with reference to a solicitor's right to remuneration, having regard to the provisions of the *Solicitors' Remuneration Act*, 1881, and the General Order which has been made in pursuance thereof. In order that I may explain the view which I take of those questions I must begin by stating some of the facts, all the more that they do not seem to have been quite accurately

(1) 29 Ch. D. 608.
(2) 31 Ch. D. 30.
(3) 33 W. R. 776.
(4) 25 Ch. D. 301.
(5) 34 Ch. D. 433.
(6) Ibid. 607.

laid before the Taxing Master. [His Lordship then stated the facts of the case and continued :—]

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All the matters of business to which the taxation related were undertaken by the Plaintiff's solicitor before the 31st of December, 1882, and the first question I have to consider is whether the solicitor had under rule 6 of the General Order a right to elect to be remunerated under the system which prevailed before the Order came into operation. Now it was decided in *In re Field* (1) that the Order made under the *Solicitors' Remuneration Act* applied to business which had been commenced before the Order came into operation. In dealing with that question Lord Justice *Cotton*, after reading rule 6 of the General Order, said (2): "Here it was said that the solicitor could not exercise his option because the business was in full swing before the rules came into operation, and that the scale therefore could not apply. This argument is forcible, but I think it cannot prevail when we look at the 7th section of the Act: 'As long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby.' No doubt the application of the Act to pending business alters the contract under which the business was undertaken, but this alteration may in some cases be for the benefit of the solicitor." I stop there for the present. Lord Justice *Lindley* also said (3): "Perhaps the most difficult question is whether the rules apply at all to pending business; but sect. 7 of the Act satisfies me that they are applicable." And Lord Justice *Fry* said (4): "I am of the same opinion. I think that sect. 7 of the Act declares in substance that the Act shall apply to all bills which are taxed while any General Order is in force. If the Act had not been intended to apply to pending business, different language would have been used." Therefore, all the learned Judges constituting the Court of Appeal rely on sect. 7 of the Act, "as long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby."

That being so we must look at the General Order. Now I apprehend that the Order might have been framed in express

(1) 29 Ch. D. 608.
(2) Ibid. 614.
(3) 29 Ch. D. 616.
(4) Ibid.

STIRLING, J. terms so as to distinguish between the two classes of business, namely, business which was undertaken before the Order came into operation and business which was undertaken afterwards. It might have provided, for example, in express terms: "This Order shall not apply to any business undertaken before this Order comes into operation, and shall only apply to business undertaken after it comes into operation," or it might have said in express terms: "This Order shall apply to all business whether undertaken before or after the date fixed for the Order coming into operation." But there is no express provision in the Order on the subject, and therefore it is a matter of construction which way the Order is to be read; and the Court of Appeal in *In re Field* (1) have settled that it is to be read as including business undertaken before the Order came into operation, as well as business which is undertaken afterwards. That being so, I have to deal with rule 6, and that rule must, I apprehend, be read with reference to the construction put on the Order by the Court of Appeal in *In re Field*. It begins: "In all cases to which the scales prescribed in Schedule I. hereto shall apply"—and I am to read that as including cases where the business was undertaken before the Order came into operation as well as cases in which the business was undertaken subsequently to the date fixed by the Order for its coming into operation. Then it proceeds: "A solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto." Now, if the words "before undertaking any business" are to be read as limited to the absolute commencement of the business before any work is done which the scale charges would cover, it is impossible to give that rule a sensible meaning as applied to business undertaken before the rule came into operation. If the right of election does not apply to business undertaken before the Order came into operation, it would, as is pointed out by Lord Justice *Cotton*, be a forcible objection to the construction which the Court of Appeal has decided is to be put on that Order. I must, therefore, if I can, read rule 6 in such a way that it shall not involve an impossibility when applied to

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(1) 29 Ch. D. 608.

business undertaken before the date of the Order. It seems to me that it is possible to put such a construction upon it. In fact, if the rule is read as if the words "subsequently to this Act coming into operation" were inserted before the words "before undertaking any business" so that it would run: "In all cases to which the scales prescribed in Schedule I. hereto shall apply a solicitor may, subsequently to this Act coming into operation, and before undertaking any business by writing under his hand," elect, and so forth, it seems to me that justice would be met and that a rational interpretation could be put on the Order, and one which is not contrary to the whole scope of it, as interpreted by the Court of Appeal. That agrees with the suggestion which is made by Lord Justice *Cotton* in the passage which immediately follows that which I have read, where he says (1): "It may be that if a solicitor, after the rules came into operation, gave notice that he elected to have remuneration for business then pending according to the old system as modified by Schedule II., we should hold such a notice effectual." That is no more than a *dictum*, but, so far as it goes, it is in favour of the view of construing the rule in the way in which I have thought proper to construe it.

Before passing from that I ought to notice one remark which is made by the Taxing Master, namely, that the time which ought to be considered is not the date at which the Order is to come into operation, but the date at which it was made, which was several months before the 31st of December, 1882, after which day it was to come into operation. Having regard to the ground which was adopted by the Court of Appeal in *In re Field* (2), namely that rule 6 must be read with the 7th section of the Act, I do not think that that is the proper moment at which we ought to look. Having regard to that section, I think the dividing line is to be drawn, not at the date when the Order was made, but at the date when it came into operation. Then it is settled by the decisions in *In re Allen* (3) and *Hester* v. *Hester* (4), that the words "before undertaking any business" mean before the solicitor does any work which the scale charges

(1) 29 Ch. D. 614.
(2) Ibid. 608.
(3) 34 Ch. D. 433.
(4) Ibid. 607.

STIRLING, J. would cover. Therefore I think upon the construction of the rule that the solicitor was at liberty to give a notice of election after the 31st of December, but that he was bound to do so before he did anything which was covered by the scale charges.

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Then the next question which I have to consider is, whether the notice which he gave on the 2nd of January, 1883, was sufficient. [His Lordship read the letter of that date, and continued:—] It is said by the Taxing Master that it is not sufficient, because the solicitor uses the word "propose" instead of the word "elect." I do not think that that argument ought to prevail. It seems to me that you must look at the substance of the letter. It contains a distinct reference to the rule, and is an intimation to the client that he intends to avail himself of the advantage which is given to the solicitor by that rule. That seems to me to be sufficient.

Then I have next to consider whether these conveyancing matters form separate matters of business, or whether they are all to be treated as one, and under the circumstances of this case I think they ought to be treated as several. The case is different from that which it was supposed to be by the Taxing Master. The Taxing Master appears to have thought that the work was all done under one direction given for sale of the testator's estate. In point of fact, each matter was the subject of a separate order by the Court, and was begun at a different time, and some of the matters were begun before even judgment in the action. I think, therefore, whatever might have been the case if the work had been all done pursuant to a direction giving the Plaintiff the conduct of the sale of the testator's real estate, that in this particular case the separate transactions ought to be treated as separate matters, and that, as the Act applies to matters of conveyancing arising in an action, each matter ought to be dealt with separately, and the business ought not to be deemed to be undertaken until the time arises at which the solicitor has done some work which would be covered by the scales.

Now, I have to apply these principles to the six matters of conveyancing which are dealt with by the Taxing Master's certificate. The first is the sale of *Caledon House*. He finds that this has been in progress from the 10th of December, 1881, and

after stating the various charges in the months of September, October, and December, there is also one on the 1st of January, the day on which the Order came into operation. We therefore find that on the 1st of January, and before the notice was given, the solicitor did work which was covered by the scale charges. I think therefore that in this respect the Taxing Master was right, and his decision cannot be disturbed. The same applies to the next, the sale of *Stanley Villas* to the *Star Life Assurance Society*. It commenced in 1881; there are charges in September, October, November, and December, 1882, and, as in the last case, a letter written on the 1st of January. Therefore, as regards that, his decision cannot be disturbed. The third is the lease of *Cromer House* to Mr. *Saltmarsh* in 1882, concluded in November, before the Orders came into operation. There nothing has been done to prevent the solicitor from electing. Therefore, as regards that, I think the Taxing Master's decision was not right, and that must go back to him for reconsideration.

As regards the items comprised in No. 4, they were commenced in June, 1882, and completed in March, 1883, and there are charges in November and December, 1882, and a charge for perusing the draft on the 2nd of January, 1883. Then as regards *Bonnington House*, No. 5, that was commenced in April, 1882, and completed in July, 1884, and there are charges in September, October, November, and December; on the 31st of December, 1882, a letter was written on the subject of the sale, and on the 2nd of January, the day on which the notice of election was given, another letter was written. It is stated that the solicitor has not proved that the letter of the 2nd of January was subsequent to the letter communicating the election. As regards the 4th and 5th matters, I think they must go back to the Taxing Master, and he must inquire whether the work which is charged for on the 2nd of January was done before or after the notice was communicated to the client. As regards the 6th, there is an attendance in January, 1883, without a date, prior to the 4th of January in that year; that leaves it uncertain whether it was the 1st, 2nd, or 3rd of January. There, again, I think it must go back to the Taxing Master, and he must find out when that

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I have now dealt with all the conveyancing matters; and I think, having regard to the nature of the case, that the costs of both parties must be costs in the action.

Solicitors: *Darley & Cumberland*, agents for *H. D. M. Page, Southampton*; *Janson, Cobb, Pearson & Co.*

W. W. K.

JAY *v.* LADLER.

KEKEWICH, J.

1888

Nov. 10, 12.

[1887 J. 1193.]

Trade-mark—Registration—Class—Mark affixed—Common Law Right—No one deceived—Patents, Designs and Trade Marks Act.

A trade-mark registered under one of the classes given by the rules, but in respect to some particular articles in that class, will be protected under the *Patents, Designs and Trade Marks Act* as to those articles only.

A trade-mark need not be actually affixed to the article. It is sufficient if the trade-mark is on the cover or wrapper in which the article is sold.

The common law rights of a tradesman using a trade-mark are not affected by the registration of the trade-mark, so that, if he has acquired a right to a trade-mark as to a certain class of goods, and the trade-mark as registered is confined to a part of that class of goods, he will be entitled to protection for the whole class of goods.

A tradesman must not advertise his goods as being those of another tradesman, and will be restrained from doing so, though it is not proved that any one had been deceived.

THE Plaintiff, *T. S. Jay*, who carried on the business of a furrier in *Regent Street* under the name of the *International Fur Store*, had in 1883 registered, in class 38, in respect of sealskin mantles and sealskin coats, a trade-mark consisting of a representation of a lady and a bear, which, as the Plaintiff alleged, was commonly known as "*The Lady and the Bear*," and was of great value to him in his business of a furrier. The Defendant was a furrier at *Kingsland*, in the north-east of *London*, and, as the Plaintiff alleged, had imitated this trade-mark, and had infringed the trade-mark. The Plaintiff brought this action to restrain the Defendant. The statement of claim appeared only to claim the rights under the *Patents, Designs and Trade Marks Act*, but, as it was doubted whether this would extend to anything more than mantles and coats, an amendment was allowed at the trial claiming protection under the general law.

The Defendant pleaded that the Plaintiff's trade-mark was applicable only to sealskin mantles and coats, to which the representation used by the Defendant had not been applied, and that the registration was insufficient to protect the trade-mark

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unless it was affixed to the goods in respect of which it was registered, or to some envelope containing them.

This was the trial of the action.

The Plaintiff proved that he had continually used the trade-mark for various goods since 1883, and that though the mark was not actually affixed to the articles sold, it was usually printed on the boxes or covering-papers in which the articles sold were sent to the customers. Each of the trade-marks had a lady and a bear, though they were somewhat different; but in the opinion of the Court, on the evidence, the Defendant's mark was calculated to deceive.

The Defendant was not proved to have sold any articles with his mark appended, but he had sent to his customers a circular inclosing a slip of paper on which his lady and bear were printed.

Aston, Q.C., and *E. S. Ford*, for the Plaintiff:—

The selection of one article out a class does not limit the trade-mark to that article. Even if the Plaintiff has no right under the *Patents, Designs and Trade Marks Act*, he has a clear common law right to the exclusive use of the mark: *Croft* v. *Day* (1); *Perry* v. *Truefitt* (2); *Somerville* v. *Schembri* (3).

The witnesses for the Plaintiff were then examined and cross-examined.

Barber, Q.C., and *Slater*, for the Defendant:—

This case was launched entirely on the *Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. c. 57), and was only amended at the last moment as to the general right. The Plaintiff asks the Court to hold that the registration is good in respect of all goods in class 38, but it clearly includes only sealskin mantles and coats: *Edwards* v. *Dennis* (4). Moreover, he has lost his right by using the mark on other things. It was not an old trade-mark good before registration, and he himself has confined it to two articles.

But, besides this, he has not affixed the trade-mark to each

(1) 7 Beav. 84.
(2) 6 Beav. 66.
(3) 12 App. Cas. 453.
(4) 30 Ch. D. 454.

article sold: *Singer Manufacturing Company* v. *Wilson* (1); *McAndrew* v. *Bassett* (2); *Leather Cloth Company* v. *American Leather Cloth Company* (3). The designs are not in the least alike, and the Defendant's design is not calculated to deceive.

Then as to the general law. To establish a claim under that it must be shewn that the public has been deceived or might be deceived, and there is no evidence of anything of the kind: *Singer Manufacturing Company* v. *Loog* (4). There is no proof of any sale by the Defendant, and the only thing is the circular issued by him, which is not enough.

Aston, in reply:—

The registration is valid for all goods in class 38, and the mantles and coats are only given as examples. The plaintiff in *Edwards* v. *Dennis* (5) only failed because he could not prove that he had ever made the wire. But if the Plaintiff has not protection under the Act, he has it under the general law. The Plaintiff has for many years used this trade-mark, and if in registering it he made a mistake, that does not deprive him of his rights. Until he had acquired a right to the mark it might have been copied if the registration was bad, but that is all. The Defendant cannot be allowed to sell his furs with a lady and bear on them, and so to represent that they are the Plaintiff's.

KEKEWICH, J.:—

The first question which I have to consider is whether the registration of the Plaintiff's trade-mark, admittedly good in law, is applicable to all the goods in class 38 of the rules issued under the *Patents, Designs and Trade Marks Act*, 1883 (all of which it is conceded, or may for the purposes of the argument be conceded, he has manufactured and sold, or manufactures and sells) or must be restricted to the particular goods mentioned in the certificate at the time of registration, "sealskin mantles and sealskin coats." Mr. *Aston* has argued that because the trade-mark is registered under class 38, and that class is specified in one column, therefore the registration goes to the whole of the

(1) 2 Ch. D. 434.
(2) 4 D. J. & S. 380.
(3) 4 D. J. & S. 137.
(4) 8 App. Cas. 15.
(5) 30 Ch. D. 454.

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goods in that class, and that the description contained in the next column is only by way of illustration. Why there should be any illustration, if the whole class is included, his ingenuity has not suggested, and I am unable to supply the defect. The Act says in sect. 65 that "a trade-mark must be registered for particular goods or classes of goods"; the rules say that "for the purpose of these rules goods are classified in the manner appearing in the third schedule hereto. If any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the Comptroller." That points distinctly to the registration of goods as constituting a class, and to goods as belonging to one class or another being determined by the Comptroller; and if one looks through the schedule to the rules one finds that in some classes there is no illustration, that is to say there are no particulars given at all, and in others there are a variety of illustrations given. In this particular class 38 there are some illustrations: "hats of all kinds, caps and bonnets, hosiery, gloves, boots, and shoes, and other ready-made clothing." Sealskin mantles and sealskin coats obviously fall within the general description "ready-made clothing." It was competent to Mr. *Jay* to elect to be registered under class 38 for articles of clothing, with or without illustration, as he pleased, and as the registrar allowed. He might have registered for all these articles; but what he thought fit to do, for reasons which I suppose were good to him, was this; he thought fit to register for "sealskin mantles and sealskin coats," and I think he must be kept within the limits of his registration. I think that that view is distinctly in harmony with the judgment of the Court of Appeal in the case of *Edwards* v. *Dennis* (1), where the exact point did not arise, but where the treatment by the learned Judges of the words of the Act seems to me to point to the conclusion at which I have arrived. The Defendant has not been proved to have sold sealskin mantles and sealskin coats, but he has been proved to have advertised this trade-mark in connection with his business as a wholesale and retail furrier, and it has not been questioned here that a wholesale and retail furrier may sell, and probably does sell, or at any rate would be glad if the opportunity occurred to sell, sealskin mantles and sealskin coats.

(1) 30 Ch. D. 454.

There is one argument which was addressed to me on behalf of the Defendant which I must notice in this connection, and that is, that though this trade-mark has been used by the Plaintiff, and though it was registered with reference to these trade articles, it has never been affixed to any article, or, at any rate, not proved to have been affixed, and the judgment of Sir *George Jessel* in *Singer Manufacturing Company* v. *Wilson* (1) was quoted to me, in which he insisted on the necessity of, in that particular case, affixing or impressing the trade-mark. Now, to my mind, there is some fallacy in quoting those expressions in a case like this. There is no statutory provision, but no doubt the Court would consider (I think that follows from the case of *Edwards* v. *Dennis* (2)) that the trader is bound to connect in some way the articles sold or sought to be protected with the trade-mark which he has registered, and if ever it occurs that a trader comes into Court and says, "I have registered a trade-mark in respect of certain goods, and I have sold those goods, but I have not sold those goods as the goods of that trade-mark," he would have, at any rate, some difficulty in maintaining his rights. But here Mr. *Jay* has proved in the witness-box that, at any rate as regards this particular class of goods, they are either wrapped up in a brown paper wrapper containing the trade-mark, or put into a box with this trade-mark on it, and if there is a label affixed or put upon them at all it is a label containing this trade-mark; and I am satisfied that he has sold these things from time to time as goods protected by this trade-mark. Therefore I think that that argument fails.

The Defendant has advertised what I say is the trade-mark in infringement of the Plaintiff's rights. I say it is the trade-mark, because, though there may be some differences, there can be no question to my mind that one is a colourable imitation of the other—their similarity is so great that any person acquainted with the one might readily consider the other to be only a temporary or occasional variation of it, and one of the witnesses, who is experienced in the trade, said that it might readily deceive him. Mr. *Ladler* swore that he did not in any way copy it from the Plaintiff's trade-mark. It requires some charity to suppose that

(1) 2 Ch. D. 434.
(2) 30 Ch. D. 454.

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his trade-mark was not suggested to him by having seen or heard of the Plaintiff's trade-mark. I will exercise that charity, but it is a singular thing that the two ideas should have occurred to two different minds, especially when one remembers that there are other animals which furnish fur, and that any one of these might just as well have been taken as the bear. I think therefore the Plaintiff is entitled to an injunction as asked "to restrain the Defendant from infringing the Plaintiff's said trade-mark by issuing, publishing, or circulating, or causing to be issued, published, or circulated any circular, advertisement, or notice containing or bearing the trade-mark in the pleadings mentioned, or any colourable imitation thereof, in connection with sealskin mantles and sealskin coats, or otherwise using the said trade-mark in that connection."

But that of course will only assist the Plaintiff to a limited extent. He goes further—being so limited—and says, "I ask the Court to apply the general principles of equity, and to restrain the Defendant from selling his goods or advertising his goods as mine." That claim has been introduced by amendment—an amendment which was allowed at the commencement of the trial without opposition on the part of the Defendant. On the general law, independently of the *Patents, Designs and Trade Marks Act*, there is no doubt at all. Mr. *Aston* has read a passage, which I have often heard quoted, from Lord Justice *Cotton's* judgment in *Mitchell* v. *Henry* (1), and he says that it is recognised again in the judgment in *Edwards* v. *Dennis* (2). The general law, as so expressed, is to be found in a large number of cases, and is really based on law which existed long before the *Trade Marks Registration Acts*, and has been said to have been laid down 3000 years ago. A man is not entitled, whether in trade or out of trade, to take that which is another man's, and when a man in trade advertises his goods as being the goods of another person, he is doing that which is wrong in itself and liable to injunction in this Court. A man is not entitled to say, "I live in the East End of *London*, and you need not go into *Regent Street*, and purchase your goods at a fashionable shop there, where perhaps you may have to pay a larger price—you may come to me—I can give you the same goods, and without

(1) 15 Ch. D. 181. (2) 30 Ch. D. 454.

the trouble and expense which a visit to my rival in the West End will entail on you." He is not to do that and, if he does it in any way he is liable to be restrained, and the Court is not, and never has been, and I hope never will be, astute to find differences which will allow a man to evade the general law. In this case he has simply advertised this mark; he says he has not advertised it in the newspaper, but he has advertised it in this particular way—a pink slip, on which is a lady and a bear, has been printed, and sent out to his customers, and this, I think, is in effect saying, "The goods which I offer for sale are the *International Fur Store* goods." I think that that pink slip, and the advertisement which preceded it, come distinctly within the vigorous description of Lord Justice *Bowen* in *Newman* v. *Pinto* (1), which he applied to the pictures on cigar boxes—"pictorial lies."

That being so, if it were not for the registration, I should have not the slightest difficulty or hesitation in restraining the Defendant from using it. My difficulty has been occasioned by the registration. I have already held that, whether by accident or on purpose, Mr. *Jay* has registered this trade-mark with reference only to "sealskin mantles and sealskin coats," but he has used it for many other articles, including, as we have heard from him, gloves, and other things of a like description. He now seeks to apply the general principle, notwithstanding that he has registered this trade-mark for certain goods only, to many other goods. About this I felt considerable difficulty, but I think that Mr. *Aston* has given the correct answer. The Plaintiff may have been ill-advised; he may have gone beyond his rights; if so, he has done it at his own risk, but he has been guilty of no fraud; there is no impropriety in Mr. *Jay* endeavouring to appropriate the lady and bear as the description of his goods. If within a reasonable time after the registration which was in the year 1883, Mr. *Ladler*, or any other person, had used the lady and bear for goods to which the registration could not apply, it would have been done with impunity. Mr. *Jay* would not then have been able to say, "the lady and bear designates my goods; my goods are known in the market as the lady and bear goods; a man who sells lady and bear goods sells my

(1) 4 Rep. Pat. Cas. 508, 519.

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goods, or says he sells my goods." Therefore, he ran for a considerable time great risk of having his mark taken by some other persons with impunity; but years have gone on, and now, without the slightest impropriety, Mr. *Jay* has appropriated the lady and bear to the goods sold by him, and that being so, I see no reason why the general principle should not apply in his favour, notwithstanding the defect, if defect it be, in his registration. Therefore, I think, in addition to the injunction which I have already mentioned, the Defendant must be restrained from using the device of a lady and bear so as to deceive the public. Mr. *Barber*, said with truth, that nobody had been deceived; that nothing had been actually shewn to have been sold, but the law does not require that there should be any proof of actual deceit. The law is content, as laid down by Lord *Watson* in the judgment in *Singer Manufacturing Company* v. *Loog* (1), with proof of acts likely to deceive, and I have no doubt that these acts of the Defendant are likely to deceive. The Plaintiff is therefore entitled to both these injunctions.

Then comes the question of costs. The Plaintiff has succeeded in protecting his registration to a limited extent, but he has failed in protecting it to the extent which he asked, and which he sets up. So far he is an unsuccessful litigant, but when it comes to the question of depriving him of his costs on that ground, I have to remark not merely that the Court is unwilling to deprive a successful Plaintiff of costs, simply because he does not succeed to the whole extent, but I must bear in mind what occurred in 1885.

[His Lordship then commented on what then occurred, when the Defendant had made use of a lady and bear trade-mark, coming to the conclusion that the Plaintiff must have the whole costs of the action.]

Solicitors for Plaintiff: *Taylor, Hoare & Box.*
Solicitor for Defendant: *W. Dunkerton.*

(1) 8 App. Cas. 15.

C. M.

END OF VOL. XL.

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CHAMPERTY—*continued.*
the action free from control by K., who was, so far as the rules and practice of the Court would permit, to give all assistance and information in his power to assist F. to carry on the action, and F. agreed to carry on the action at his own expense with diligence, and to use his best endeavours to bring it to a successful issue, with power to compromise, and the money, which might be recovered or might be received by way of compromise after deducting actual disbursements not paid by the Defendants (but not including F.'s solicitor and client costs), was to be divided into four parts, three to belong to F., and one to K.—F. having obtained an order of course to carry on the proceedings in the action, the Defendants moved to discharge the order on the ground that the deed of the 10th of May, 1888 was champertous.—It appeared from the evidence that F. was acting as trustee for himself and other creditors under the bankruptcy, including the Plaintiffs' solicitors, who were also the solicitors of F.:—*Held*, that the principle of the decision in *Seear* v. *Lawson* (15 Ch. D. 426) applied, and that the fact that some of the creditors were to carry on the action at their own risk and expense, and to take a larger share of the fruits of the action than they otherwise would have done, did not bring the case within the law against champerty and maintenance, and that the transaction was one permitted by the bankruptcy laws.—The maintenance of the suit of another is lawful where the persons maintaining have an interest in the subject-matter of the action. GUY *v.* CHURCHILL [481

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3. —— *Management — Ratification by Company of particular act of Directors in excess of Authority—Alteration of Articles.*] The articles of the T. Company authorized the sale of part of its undertaking to any other company, and contained a provision prohibiting any director from voting in respect of any contract in which he was interested. The directors entered on behalf of the company into a contract for sale of part of its undertaking to the U. Company, of which all the directors of the T. Company except one were directors. A general meeting of the T. Company was called by a notice stating that it was called to consider a resolution for approving and adopting the agreement, but not stating any ground for a meeting being necessary. The resolution was passed as an ordinary resolution, but not as a special resolution:—*Held*, that though a resolution giving the directors powers to do certain acts in future which they were not authorized by the articles to do, would be an alteration of the articles, and would require to be passed as a special resolution, the adoption of a contract which was within the objects of the company, but which the directors had entered into without authority, was not an alteration of the articles, and could be effected by ordinary resolution:—*Held*, also, that the resolution of the general meeting was not invalidated by the fact that the notice convening it did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting. — Decision of Chitty, J., affirmed. Grant *v.* United Kingdom Switchback Railways Company - **C. A. 135**

4. —— *Reduction of Capital—Confirmation by Court—Preference and Ordinary Shares—Resolution for Reduction of Ordinary Shares alone—Sufficiency of Notice to Shareholders—Discretion of Court—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.] The capital of a company consisted of 100,000 ordinary shares of £10 each, of which 80,659 had been issued and paid up in full, and 100,000 preference shares of £1 each, of which 37,518 had been issued and paid up in full. The preference shares were entitled to a preferential dividend of 10 per cent. per annum, but were not entitled to any preference in respect of capital. The company having lost paid-up capital to the extent of £80,659, a special resolution was passed that this loss should be written off by reducing the ordinary shares by the sum of £1 each. No reduction was to be made in the preference shares. The special resolution was carried by the unanimous vote of the shareholders who were present in person or by proxy at the first and second meetings respectively. At the first meeting about one-third in value of the shareholders were present in person or by proxy, and at the second meeting about one-fourth. The notices convening the meetings had stated exactly the resolution which it was intended to propose, but they did not call the attention of the shareholders to the fact that the result would be to throw the loss of capital exclusively on the ordinary shareholders. No ordinary shareholder had expressed any dissent from the resolution:—*Held*, that, as by the existing constitution of the company the loss

COMPANY—*continued.*

ought to be borne by all the shareholders rateably, and the effect of the resolution would be to alter the constitution of the company in this respect, and to throw the loss exclusively on the ordinary shareholders, the notices of the meetings were insufficient, and that, therefore, it would not be fair, as between the ordinary and preference shareholders, that the resolution should be confirmed by the Court.—After this decision a circular was sent to every shareholder fully explaining the matter, and stating the effect of the judgment. In reply to this circular 514 ordinary shareholders (the whole number being 621), whose capital amounted to £769,590, assented in writing to the resolution; 103 sent no reply; and the remaining four, who together held 188 shares, expressed their dissent. One of the four, who held sixty-two shares, afterwards withdrew his opposition. Notice that the petition would be brought on again for hearing was served on the dissentients, but none of them appeared:—*Held*, that the resolution ought to be confirmed. *In re* Quebrada Railway, Land and Copper Company - **363**

5. —— *Winding-up Petition—Withdrawal by Petitioner — Costs.*] When a petition for the winding-up of a company by the Court is withdrawn by the petitioner, each set of shareholders and each set of creditors appearing, whether to support or to oppose the petition, is as a general rule entitled to a separate set of costs, and this rule applies even when the petition is presented by the company itself.—*Re North Brazilian Sugar Factories* (W. N. 1887, p. 3; 56 L. T. (N.S.) 229) followed. *In re* Paper Bottle Company - **52**

6. —— *Winding-up—Resolution to wind up voluntarily—Appointment of Provisional Liquidator before Date of Resolution — Supervision Order—Date of Commencement of Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 84, 130.] A petition was presented for the compulsory winding-up of a company, and the same day a provisional liquidator was appointed. Afterwards the company passed an extraordinary resolution to wind up voluntarily. When the petition came on to be heard, an order was made to continue the voluntary winding-up subject to the supervision of the Court:—*Held*, that the winding-up commenced from the passing of the resolution, not from the appointment of the provisional liquidator, and that the Court had no power to alter the date of commencement.—*In re Colonial Trusts Corporation* (15 Ch. D. 465, 472) not followed. *In re* West Cumberland Iron and Steel Company - - - - - **361**

—— Liquidator—Costs - - - **471**
See Solicitor. 5.

—— Purchase from a shareholder—Mortgagee
See Mortgage. 2. [**395**

COMPENSATION—Misdescription - - **45**
See Vendor and Purchaser. 1.

COMPOSITION WITH CREDITORS - **325**
See Bankruptcy.

CONDITION — *Debenture — Time and Place of Payment.*] Where there is a condition for payment of a sum at a time and place certain, the condition is not broken by non-payment at the time unless the demand for payment is made at

CONDITION—*continued.*
the specified place.—A principal sum payable at a future date and half-yearly interest was secured by debenture, subject to conditions, that if default for fourteen days should be made in payment of any interest the principal should be immediately payable; and that principal and interest should be paid at one of two places. A half-year's interest was not paid within fourteen days of the time stipulated for, but the creditor did not appear at either place at the time named for payment:—*Held*, that the principal was not immediately payable. THORN *v.* CITY RICE MILLS - - 357

CONDITIONS OF SALE - - - 45
See VENDOR AND PURCHASER. 1.

CONFLICT OF LAWS—*Practice — Evidence of Foreign Law—Actio personalis moritur cum personâ.*] In our Courts foreign law is a matter of fact to be decided on the evidence of advocates practising in the Courts of the country whose law is to be ascertained, but if the witnesses in their evidence refer to any passages in the Code of their country, as containing the law applicable to the case, the Court is at liberty to look at those passages and consider what is their proper meaning.—According to the law of Peru a father is entitled to administer the estate of his infant child, and to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold (as it was alleged, improperly) a part of her property for much less than it proved to be worth. After his death the daughter claimed compensation out of his estate for the loss occasioned by this disadvantageous sale:—*Held*, that the father stood in such a fiduciary position towards the daughter that the rule "actio personalis moritur cum personâ" did not apply to the demand, and that, as the sale had been made without justification, the father's estate must account for the amount which would have been received from the property had it been retained in specie. CONCHA *v.* MURRIETA. DE MORA *v.* CONCHA - - - - - C. A. 543

CONVEYANCE - - - - 491
See VENDOR AND PURCHASER. 2.

COPYRIGHT—*Newspaper—Articles composed at the joint Expense of Proprietors of several Newspapers—5 & 6 Vict. c. 45, ss. 18, 19.*] The three several proprietors of three several periodicals jointly employed a person to compile for them lists of registered bills of sale and deeds of arrangement, on the terms that the copyright was to belong to the three proprietors. The three periodicals were registered under the Copyright Act. The compiling these lists required skill, and involved a good deal of labour and expense. The Defendant association copied and circulated among their own members so much of these lists as related to their own neighbourhood, which was a very small part of the whole. The three proprietors sued to restrain this proceeding:—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that the statute 5 & 6 Vict. c. 45, s. 18, was not to be construed as confining the copyright of a proprietor of a newspaper to articles composed on the terms that the copyright should belong to and be paid for by him alone, that each of the three proprietors had

COPYRIGHT—*continued.*
an interest in the copyright of the lists, that having registered his periodical he had a right to sue to restrain infringement, and that the Defendant association could not escape on the ground that it had only copied a small portion of the lists. TRADE AUXILIARY COMPANY *v.* MIDDLESBOROUGH AND DISTRICT TRADESMEN'S PROTECTION ASSOCIATION - - - - C. A. 425

2. —— *Newspaper — Injunction — Copyright Act, 1842 (5 & 6 Vict. c. 45, ss. 18, 19—Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, ss. 9, 10.*] The proprietor of a newspaper registered as a serial publication under the Copyright Act, 1842, can sue in respect of his copyright in matter published in his paper; though neither the name of the proprietor nor the title of the paper is registered under the Newspaper Libel and Registration Act, 1881.—An injunction was granted to three Plaintiffs, the proprietors of three several serial publications registered under the Copyright Act, to restrain the infringement of their joint copyright in matter printed in all three publications, though the pirated matter was copied not from either of the three publications but from a reproduction of the same matter issued in another form by the authority of one of the Plaintiffs without further registration under the Copyright Act. CATE *v.* DEVON AND EXETER CONSTITUTIONAL NEWSPAPER COMPANY - 500

3. —— *Photograph — Implied Contract — Breach of Faith—Injunction.*] A photographer, who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also on the ground that such sale or exhibition was a breach of confidence. POLLARD *v.* PHOTOGRAPHIC COMPANY - - - - - 345

COSTS—Bombay Civil Fund - - 288
See BOMBAY CIVIL FUND.

—— Patent suit—Particulars of objection 132
See PATENT.

—— Settled Land Act - - - 338
See SETTLED LAND ACT. 2.

—— Solicitors' Remuneration Act - 441, 471,
See SOLICITOR. 1—5. [475, 628, 637

—— Trustee—Employment of solicitor or stockbroker - - - - 370
See TRUSTEE. 1.

—— Unreasonable delay—Taxation - 244
See PRACTICE. 4.

—— Winding-up petition - - 52
See COMPANY. 5.

COVENANT—*Injunction—Restrictive Covenant—Annoyance and Grievance.*] The establishment of a hospital for the treatment of outdoor patients suffering from diseases of the throat, nose, ear, skin, and eye, fistula, and other diseases, is a breach of a covenant in a building lease against carrying on certain specified trades, or doing any act "which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or the assigns, or the inhabitants of, neighbouring or adjoining houses"—and will be restrained by injunction.—In order to enforce

COVENANT—*continued.*

such a covenant it is not necessary to shew that actual damage or pecuniary loss has been sustained. It is sufficient without proving actual risk of infection that sensible people feel a reasonable apprehension of risk, and interference with the pleasurable enjoyment of their houses for ordinary purposes, as distinguished from a mere fanciful feeling of distaste entertained by sensitive persons.—Per Lindley, L.J.:—Without deciding that the existence of such an hospital is per se an annoyance, the apprehension of risk of infection entertained by reasonable men amounts to a breach of the extra protection intended to be given to the covenantee by the introduction into the covenant of the words "annoyance" and "grievance" in addition to "nuisance or damage."—*Harrison* v. *Good* (Law Rep. 11 Eq. 338), in limiting the term "nuisance" in a restrictive covenant to that which is a legal nuisance, questioned:—*Held*, also, that the covenant was not confined to the lessor and his own sub-tenants, but would be broken by annoyance to the inhabitants of neighbouring or adjoining houses. Tod-Heatly *v.* Benham [C. A. 80

2. —— *Restrictive Covenant as to Use of Land—Estate sold in Lots—Mutual Covenants by Purchaser of Lots with Vendor and Purchasers of other Lots—Subdivision of Lot—Right of Owner of one Part to enforce Covenant as against Owner of the other.*] On the sale of a building estate in lots the purchaser of each lot entered into a covenant with the vendor and with the purchasers of the other lots not to build upon his lot beyond a specified building line. The purchaser of one lot mortgaged a part of his lot. The mortgagee had notice of the covenant, but no express restriction as to the use of the land was imposed on him by the mortgagor. The mortgagee afterwards foreclosed and sold the mortgaged land, part of which ultimately became vested in the Defendants by purchase. The Defendants, as well as the sub-purchasers through whom they claimed, took with notice of the restrictive covenant:—*Held*, that there was no implied obligation as between the mortgagor and the mortgagee restricting the use of the land, and that the mortgagor was not entitled to enforce the restrictive covenant as against the Defendants. King *v.* Dickeson - - - - - - 596

—— For quiet enjoyment—Nuisance - 71
See Landlord and Tenant.

—— Restrictive—Sale of business premises 601
See Vendor and Purchaser. 3.

—— To settle after-acquired property - 5
See Settlement. 1.

DAMAGES—Interest on purchase-money 563
See Vendor and Purchaser. 4.

—— Unliquidated—Bond in restraint of trade
See Restraint of Trade. 1. [112

DEBENTURE—Condition as to payment - 357
See Condition.

—— Railway company—Charge on superfluous lands - - - - 119
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DEBTORS ACT—Arrest—Fiduciary relation 190
See Arrest.

DELAY—Costs—Unreasonable delay—Taxation
See Practice. 4. [244

DIRECTOR—Ultrà vires act—Commission on shares - - - - 141
See Company. 1.

—— Ultrà vires act—Ratification by company
See Company. 3. [135

DISCLAIMER—Devise to trustee—Legal estate
See Trustee. 2. [436

DISCRETION OF COURT—Staying proceedings—Agreement for arbitration - 579
See Arbitration.

DIVISIBLE COVENANT—Validity - 5
See Settlement. 1.

DIVORCED WIFE—Legacy - - 30
See Will. 4.

DOMICIL—*Legitimacy—Illegitimate Child—Subsequent Marriage of Parents—Legitimation of Child—Intervening Marriage of Father with another Woman—Length of Residence.*] In the year 1734, Marc T., a Swiss, twenty-two years of age, whose domicil of origin was Geneva, came to England; and carried on business and resided in England from that time until his death in 1779.—Some time after his arrival he formed a connection with Martha P., an Englishwoman, with whom he lived as man and wife. In 1744 he had a daughter by her, who was baptised as his child by the name of Sarah T., and who left issue. Between 1744 and 1747 he had two other illegitimate children by Martha P., who were born respectively in 1745 and 1747, and left no issue. In 1749 he married another Englishwoman named Elizabeth W., and by her he had one child, who was the mother of the intestate in this administration action.—Elizabeth died in 1752, and in 1755 Marc T. married Martha P. and had legitimate children by her, one of whom, S. M. T., had issue.—By the law of Geneva illegitimate children are legitimated by the subsequent marriage of their putative father and their mother notwithstanding an intermediate marriage of their father with another woman and the birth of a child by her.—After the death of the intestate, the descendants of Sarah T. (who was born before the marriage of Marc T. and Martha), and the descendants of S. M. T. (who was born after that marriage) set up conflicting claims in the action to be the next of kin of the intestate; and it was held by Stirling, J., that Marc T. had acquired an English domicil at the date of the birth of Sarah T. in 1744, that consequently Sarah T. was not legitimated by the subsequent marriage of Marc T. and Martha, and the descendants of S. M. T. alone were entitled as next of kin of the intestate.—On appeal, held by Cotton and Lopes, L.JJ., that the domicil of Marc T. was English, both at the date of the birth of Sarah T. in 1744, and of his subsequent marriage with Martha in 1755:—*Held*, by Fry, L.J., that the domicil of Marc T. was English, at the date of his marriage with Martha, but not at the date of the birth of Sarah T.—*Held*, by the Court that a child born before the marriage of its father and mother cannot be legitimated by their subsequent marriage unless

DOMICIL—*continued.*
the father was domiciled in a country whose laws allowed such legitimation, both at the time of the marriage which gave the child the status of legitimacy, and at the time of the birth on which it took from its putative father the potentiality of being legitimated.—Acts, events, and declarations subsequent to the time at which a question of domicil arises are admissible in evidence upon that question when they indicate what the intention was at the given time. *In re* GROVE. VAUCHER *v.* THE SOLICITOR TO THE TREASURY [C. A. 216

EDUCATION—Infant—Guardian - - 200
See INFANT. 1.

EVIDENCE—Domicil - - - 216
See DOMICIL.

EXECUTOR—*Administration—Power to Executors to carry on Business—Right of Executors to Indemnity—Rights of Creditors of Testator and subsequent Creditors of the Executors.*] Executors carried on the business of their testator under a trust contained in his will. A question having arisen between the creditors of the testator and the trade creditors of the executors as to priority: —*Held*, that as against the assets of the testator existing at his death, the creditors of the testator were entitled in priority to any claim by the executors to indemnity in respect of the trading liabilities; and that the trade creditors of the executors had no better claim than the executors:—That as against the assets subsequently acquired by the executors in the course of their business, the executors had a claim for indemnity out of those assets in respect of their trade liabilities in priority to the creditors of the testator: and that the trade creditors of the executors were entitled to stand in the place of the executors in enforcing their claim to indemnity:—That if the executors were themselves indebted to the testator's estate, their claim to indemnity and the claims of their creditors through them failed to the extent of their indebtedness. *In re* GORTON. DOWSE *v.* GORTON - - - - - C. A. 536

EXECUTORY DEVISE—Production of tenant for life—6 Anne, c. 18 - - - 589
See TENANT FOR LIFE.

FIDUCIARY RELATION—Debtors Act - 190
See ARREST.

—— Parent and child - - - 543
See CONFLICT OF LAWS.

—— Photographer—Copyright - - 345
See COPYRIGHT. 3.

FOREIGN LAW—Evidence of—Actio personalis moritur cum personâ - - 543
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FOREIGNER—Trade-mark—Registration 620
See TRADE-MARK. 2.

FRAUD—Sale at undervalue - - 312
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FURTHER CONSIDERATION—Order on—Time for appealing - - - 110
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GENERAL ORDER, August, 1882, Rule 2 (a), Sched. I., Part I. - - - 441
See SOLICITOR. 4.

—— **Rules 2 (c), 4, Sched. I., Part I., rr. 2, 11**
See SOLICITOR. 1. [628

—— **Rule 6** - - - - 471, 637
See SOLICITOR. 3, 5.

—— **Rule 7** - - - - - 475
See SOLICITOR. 2.

GUARDIAN - - - - - 200
See INFANT. 1.

HOSPITAL—Nuisance—Restrictive covenant 80
See COVENANT. 1.

HUSBAND AND WIFE—*Chose in Action of Wife—Title of Husband—Probate of Will of Married Woman having no Testamentary Capacity—Action by Husband against Executor in Chancery Division—Jurisdiction—Probate Rules*, 1887—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 34.] A married woman, who was entitled to choses in action, but had no separate property and no testamentary capacity by assent of her husband or otherwise, made a will whereby she appointed executors, and gave her property away from her husband. Probate of the will having been granted in the ordinary form to one of the executors, the husband brought an action against him in the Chancery Division claiming the choses in action; —*Held*, that the husband, suing the executor in this Court, must treat the will as valid, and that in order to establish his right to the choses in action his proper course was to take proceedings in the Probate Division to recall the probate and obtain administration to his deceased wife. SMART *v.* TRANTER - - - - - 165

2. —— *Separate Property of Wife—Gift by Wife to Husband—Capital—Income—Evidence.*] A married woman being entitled to a sum of money for her separate use under the will of a testatrix, a mortgage for a larger sum held in trust for the testatrix was transferred in the year 1867 by the married woman and another person, as executors of the trustee, to the husband of the married woman, he paying out of his own money to the executor of the testatrix the amount of the difference between the two sums. In 1869 the husband as mortgagee sold the mortgaged property, and his wife and the other executor of the original mortgagee, as such executors, concurred in the assignment to the purchaser, the execution of the assignment by the wife being procured by the husband. The husband received the purchase-money and applied it to his own use. The husband and wife lived together in amity until his death, and no proceedings were ever taken against him by her in respect of her money so received, nor did she receive any income thereof. There was no issue of the marriage. The husband died in 1885, having by his will, made in 1860, given his wife a life interest in his property. After his death she claimed to rank as a creditor against his estate for the sum received by him in 1867 with subsequent interest. She denied that she ever gave him any authority to receive the money, and there was some evidence that she objected to his receiving it. In the

HUSBAND AND WIFE—*continued.*

transactions in reference to the mortgage she did not appear to have had any separate advice:—*Held*, that those who claimed under the husband had not discharged the burden which lay upon them of proving a gift of the capital sum by the wife to the husband, and that her claim in respect thereof must be allowed; but—*Held*, that as to the interest accruing during the life of the husband the claim must be disallowed. *In re* Flamank. Wood *v.* Cock - - - 461

3. —— *Separate Property—Restraint on Anticipation—Release of Restraint—Conveyancing and Law of Property Act*, 1881, *s.* 39—*Release of Power.*] The power which the Conveyancing and Law of Property Act, 1881, s. 39, gives to the Court of dispensing with a restraint on anticipation is a discretionary power, to be exercised with great caution, and only where a strong case is made for it, and is not necessarily to be exercised because it will be for the benefit of the married woman.—A fund was settled on a married woman for life for her separate use with a restraint on anticipation, remainder to her children and issue as she should appoint, and in default of appointment to the children equally, with cross limitations in the event of any dying under twenty-one without issue. She being in straitened circumstances arranged with her eldest son that his fifth share in a part of the trust funds should be applied in a specified way for her benefit. With a view to this she released her power of appointment over the trust funds, and then applied to the Court to have the fifth share of the son in the agreed part of the funds together with her life interest therein sold, and the proceeds applied as above:—*Held* (affirming the decision of Kay, J.), that the Court would not in the exercise of its discretion dispense with the restraint on anticipation in order to give effect to a release executed by the donee of the power for her own benefit.—*Cunynghame* v. *Thurlow* (1 Russ. & My. 436) approved. *In re* Little. Harrison *v.* Harrison [C. A. 418

—— Divorced wife—Legacy - - 30
See Will. 4.

INCOME—Charge of debts - - - 610
See Will. 2.

INDEMNITY—Executors carrying on business
See Executor. [536

INFANT—*Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27)—*Rights of surviving Mother as statutory Guardian—Religious Education of Infants.*] The rule that the father in his lifetime has the absolute right to decide what religious education his children shall receive, and that after his death the guardians of the children are bound to see that they are brought up in the religious faith of their father, is unaffected by the Guardianship of Infants Act, 1886. Accordingly, although under that Act a mother who survives the father of her children is now by law their guardian, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by him, she has no greater powers as regards the religious education of the children than those which any guardian, appointed by will or otherwise, had at the passing of that Act; and, unless under very special circumstances, she is bound to see that the children are brought up in the religious faith of the father, whatever that faith may have been.—Where the deceased father was a Protestant and the surviving mother a Roman Catholic the Court, under the powers of the 2nd section of the Act, appointed two Protestants to act jointly with her as co-guardians of the infant children of the marriage and directed that they should be brought up as members of the Church of England. *In re* Scanlan - - - - 200

2. —— *Ward of Court—Marriage in Contempt—Settlement—Jurisdiction—Infants' Settlements Act* (18 & 19 *Vict. c.* 43).] The Court has no jurisdiction to compel an infant ward of Court to make a settlement of his own property because he has been guilty of contempt in marrying without leave.—A Defendant to an action in which he was made a ward of Court married without leave, being in the twentieth year of his age. About eight months afterwards, he having in the meantime attained the age of twenty, an order was made on the application of his testamentary guardian in the action and in the matter of the Infants' Settlements Act, that a proper settlement of his property should be settled by the Judge, and that he should execute the settlement when so settled. He accordingly executed a settlement approved by the Judge. As soon as he attained twenty-one he brought his action to set aside the settlement, and also appealed against the order directing it. He deposed that he had always objected to the settlement and executed it only because he thought he should get into trouble if he did not:—*Held*, that the order for a settlement must be discharged, for that the Court had no jurisdiction to compel the ward to make a settlement, and the order was in form and substance an order in invitum, and could not be construed as merely authorizing him to execute a settlement which he was willing to make.—Whether, after such a lapse of time, the settlement could be treated as made "upon the marriage" within the meaning of the Infants' Settlements Act, *quære*. Whether the Act can be resorted to after a male infant who marries under the age of twenty attains that age, *quære*. *In re* Leigh. Leigh *v.* Leigh - C. A. 290

INJUNCTION—Copyright - - 345, 500
See Copyright. 2, 3.

—— Nuisance - - - - 80
See Covenant. 1.

—— Restraint of trade - - 49, 112
See Restraint of Trade. 1, 2.

INTEREST—By way of damages - - 563
See Vendor and Purchaser. 4.

INTESTACY—Share of residue bequeathed back to testator - - - - 159
See Will. 3.

INVESTMENT—Purchase-money—Settled Land Act - - - - - 594
See Settled Land Act. 1.

IRELAND—Land in—Sale—Remuneration of solicitor - - - - 441
See Solicitor. 4.

JUDGMENT CREDITOR — Priority—Debenture-holders of railway company - 141
See COMPANY. 1.

JURISDICTION — Agreement for arbitration — Railway Companies Arbitration Act
See RAILWAY COMPANY. 1. [100

—— Bombay Civil Fund—Costs - - 288
See BOMBAY CIVIL FUND.

—— Infant ward of Court—Settlement - 290
See INFANT. 2.

—— Lands Clauses Act—Declaration of title
See LANDS CLAUSES ACT. 1. [268

—— Summons under Charitable Trusts Act 298
See CHARITY.

—— Trust money—Expenditure on repairs 512
See TRUSTEE. 3.

LANDS CLAUSES ACT—*Disputed Interest—Declaration of Title of Landowner—Jurisdiction of High Court.*] A., in occupation of land under a building agreement determinable if the buildings were not completed by the 30th of November, 1885, was informed in 1880 of the promotion of a bill for a railway which would affect the land. A. thereupon had an interview with his landlord's agent, who told him to suspend building operations till the result of the railway scheme was known—no express agreement to extend the time for building being come to. In 1883, the company obtained their Act, and on the 31st of July, 1883, purchased from the landlord such part of the land as was required; the purchase being made expressly subject to the building agreement. On the 16th of September, 1884, the company gave A. notice to treat. A. sent in no claim, and in January, 1886, the company took possession without making a deposit or giving a bond, as required by the Lands Clauses Act, insisting that A. had no interest in the land. A. thereupon commenced his action for an injunction, and to have it declared that the building agreement was subsisting and that he was entitled to have his interest assessed on that footing:—*Held* (affirming the decision of Kekewich, J. (36 Ch. D. 650)), that as the company had, without complying with the provisions of the Lands Clauses Act, entered upon land of which A. was lawfully in occupation, he had ground for an action, and that, the action being brought to trial, the Court had jurisdiction to make a declaration as to his interest in the property; and that, although the term named in the agreement had expired, he had an interest in the land, for that the agent's direction to suspend building raised an equity against the landlord to prevent his ejecting A. at the end of the term until he had a reasonable time after notice to complete the building, and that the railway company took subject to that liability. BIRMINGHAM AND DISTRICT LAND COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY C. A. 268

2. —— *Payment out of Court—Purchase-money of Settled Land taken by Railway Company—Trustees—"Party becoming absolutely entitled"—Lands Clauses Consolidation Act*, 1845, *s.* 69—*Settled Land Act*, 1882, *s.* 21, *sub-s.* 9.] Where purchase-moneys of settled lands taken by a railway company have been paid into Court under the Lands Clauses Consolidation Act, 1845, trustees for sale of such lands are not, either under the Lands Clauses Act, sect. 69, or the Settled Land Act, sect. 21, entitled as of right to payment out. Under the Settled Land Act the Court has a discretion to order such payment. Whether it has such discretion under the Lands Clauses Act, *quære*:—*In re Hobson's Trusts* (7 Ch. D. 708) doubted.—A railway company took lands, held by the two trustees of a will, upon trust for the separate use of A., a married woman, during her life, with remainder to her children, as she should appoint, and, in default, to such children as tenants in common in fee simple; and paid the purchase-moneys into Court. The two trustees of the will were afterwards appointed trustees under the settlement made by the will for the purposes of the Settled Land Act, 1882.—A. and the two trustees then petitioned that the fund in Court might be transferred to the two trustees to be held by them upon the trusts or the will.—At the date of the petition A. was sixty-five years old, and had three children who had all attained twenty-one, and these children were respondents to the petition and appeared to consent.—One of the two trustees was a solicitor, and the firm of which he was a member acted as solicitors to the trust, and as solicitors both for the Petitioners and Respondents.—Upon the hearing of the petition, Kay, J., considering that it was in the discretion of the Court whether or not to order payment out to the trustees, declined to make the order, upon the ground that the remaindermen were not represented by an independent solicitor. —Upon appeal, the Court held that the petitioners were not entitled as of right to payment out or transfer of the fund, and declined to interfere with the discretion of the Court below. *In re* SMITH. *Ex parte* LONDON AND NORTH WESTERN RAILWAY COMPANY AND MIDLAND RAILWAY COMPANY - - - - - C. A. 386

3. —— *Superfluous Land — Absolute Sale — Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 127.] A railway company on the 12th of July, 1867, conveyed certain superfluous lands, the period for the sale of which under their special Act expired on the 13th of July, 1867, and the conveyance contained a covenant by the purchasers that they would pay the purchase-money on or before the 12th of July, 1869, with interest in the meantime; and by an indenture of even date and made between the same parties, it was declared that until the whole of the purchase-money and interest were paid the company should have a lien on the deed of conveyance and the lands therein comprised:—*Held*, upon a summons under the Vendor and Purchaser Act, 1874, raising the question whether sect. 127 of the Lands Clauses Act, 1845, had been satisfied, that, having regard to expressions in the judgments of the Court of Appeal in *London and South Western Railway Company* v. *Gomm* (20 Ch. D. 562) to the effect that when land is sold as superfluous no interest in it can be retained by the company, the question was one of such doubt that it must be left open and not answered in a way which would force the title on a purchaser or prejudice the vendor's title. *In re* THACKWRAY AND YOUNG'S CONTRACT - - - 34

LANDLORD AND TENANT—*Annoyance—Nuisance—Covenant for quiet Enjoyment—Liability of Lessors—Injunction—Damages.*] A. granted a lease to B. of two rooms with a covenant for quiet enjoyment. Then A. let a room above the two to C. for dancing and other entertainments. B. brought this action against A. and C. for an injunction to restrain such use of the upper room, alleging that the dancing over his head and the behaviour of visitors on the stairs was a breach of the covenant and a nuisance:—*Held*, that the annoyance was no breach of the covenant:—*Held*, also, that the annoyance from the dancing was a nuisance, and damages given:—*Held*, also, that the annoyance from visitors on the stairs was not a nuisance for which A. or C. was liable.—*Shaw* v. *Stenton* (2 H. & N. 858) and *Sanderson* v. *Mayor of Berwick-upon-Tweed* (13 Q. B. D. 547) explained. Jenkins *v.* Jackson - - 71

LEGAL ESTATE—Disclaimer - - 436
See Trustee. 2.

—— Equitable mortgage—Lord Cranworth's Act
See Mortgage. 1. [508

LEGITIMACY—Subsequent marriage of parents
See Domicil. [216

LIGHT — *Prescription — User — Window with Shutters occasionally opened—Prescription Act* (2 *& 3 Will.* 4, *c.* 71), *ss.* 3, 4—"*Use*" *of Light* "*actually enjoyed.*"] The use of light has been "enjoyed" with a building within the meaning of sect. 3 of the Prescription Act, if the owner of the building has had the amenity or advantage of using the access of light. It is not necessary that there should have been a continuous user.—The owner of a building having windows with moveable shutters, which are opened at his pleasure for admission of light, acquires a right to light under sect. 3 of the Act at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if also there is no such interruption of the access of the light over the neighbouring land as is contemplated by sect. 4.—In such a case, if it be proved that the window-openings have remained unchanged for twenty years, and that the shutters were constructed so that they might be opened or closed at the pleasure of the owner of the building, the onus is thrown upon the owner of the neighbouring land to prove that the right has not been acquired. Cooper *v.* Straker - - - - - 21

LIQUIDATOR—Costs—Remuneration of solicitor
See Solicitor. 5. [471

—— Provisional—Commencement of winding-up
See Company 6. [361

LOCAL BOARD - - - - 55, 572
See Local Government Acts. 1, 2.

LOCAL GOVERNMENT ACT—*Local Board—Making up Road—Completion of Works—Assessment — Apportionment of Expenses — Owner — Notice—Demand—*"*Charge*," *when it commences —Debt—Public Health Act*, 1875 (38 *& 39 Vict. c.* 55), *ss.* 150, 257.] By the leases, in 1875 and 1877, of two houses abutting on a private road, the lessee covenanted to pay all rates and taxes and to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life, he paying

LOCAL GOVERNMENT ACT—*continued.*
"all outgoings and performing the covenants in the leases," and after his death upon trust for the son absolutely.—In July, 1884, the local board served notices on the father under sect. 150 of the Public Health Act, 1875, requiring him to take up the portions of the road on which the houses abutted; but the notice was not complied with, and the board themselves did the work, which was completed in February, 1885. In June, 1885, the father died, and the son entered into possession of the houses. In September, 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road, and in February, 1887, he was served with demands and orders for payments of the assessed amounts by instalments, with interest:—*Held*, in an action by the son claiming payment of the assessed expenses out of the father's estate, (1) that the expenses were not a debt due from the father's estate, inasmuch as the relation of debtor and creditor was not created by the Public Health Act, 1875, between the board and an owner of property for expenses incurred by the board: and (2) that the charge of the expenses under sect. 257 could not be recovered by the son against the estate of the tenant for life. *In re* Boor. Boor *v.* Hopkins - - - - - 572

2. —— *Local Board—Water Mains—Public Health Act*, 1875 (38 *& 39 Vict. c.* 55), *ss.* 4, 16, 51, 54, 189, 190—"*Surveyor's*" *Report*—"*Necessary*"*—Injunction.*] By the 16th and 54th sections of the Public Health Act, 1875, urban local authorities are empowered to carry water-mains through, across, or under certain roads, streets, cellars, and vaults, and, after giving "notice to the owner or occupier (if, on the report of the surveyor, it appears necessary), into, through, or under any lands situate within their district."—In December, 1887, the surveyor of the Defendants, an urban local authority, died. On the 11th of January, 1888, the Defendants by resolution appointed A. P., a civil engineer in their employment, "surveyor to the board until a further permanent surveyor be appointed." On the 21st of March, 1888, A. P. reported to the Defendants that it was "desirable and advisable" that their water-main should be carried in a particular direction from one point to another, and that it would be "necessary" to lay it through land belonging to the Plaintiff, which was within the district. This report was signed, "Your surveyor, A. P." Four days after its date X. Y. was duly appointed surveyor to the Defendants, and A. P., who was a candidate for the office, was retained in their service as waterworks engineer. The report of the 21st of March was considered and adopted by the board on the 11th of April, 1888, and in the following month a notice in pursuance thereof was served on the Plaintiff that the Defendants intended to carry their main through a part of his lands.—Upon motion made in an action by the Plaintiff for an injunction to restrain the Defendants from so doing, it was *held*:—First, that the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public."—Secondly, that upon the

LOCAL GOVERNMENT ACT—*continued.*
words of sect. 16 of the Act the person to determine the necessity was the surveyor; and that if the Court found that he had exercised his judgment and come to a conclusion in good faith, the Court ought not to interfere, even although other courses were shewn to be practicable by which the entry on private lands might be avoided; and—Thirdly, that "the surveyor" mentioned in sect. 16, must, in the case of an urban authority, be the fit and proper person duly appointed to be surveyor under sect. 189 of the Act, and no other; and that A. P. was not "the surveyor" of the Defendants within the meaning of sects. 16 and 189; and that as the report on which the proceedings of the Defendants was founded was not the report of "the surveyor," the Plaintiff was entitled to an interlocutory injunction. LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD - 55

3. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Special Act—Street—Paving and other Expenses — Estimated Expenses — Charge on Property.*] By a special Act, which was to be read together with the Public Health Act, 1875, as one Act, a local authority were empowered to apportion the "estimated expenses" of sewering, paving, and other works in a street among frontagers, and recover the expenses so apportioned either before the work was commenced, during its progress, or after its completion, by action at law or summary proceedings, and if the actual expenses were less than the estimated sum the difference was to be paid to the frontagers who had paid such sum or whose property might have been "charged therewith":—*Held*, that the right conferred by sect. 257 of the Public Health Act, 1875, to charge the property of frontagers with expenses incurred was not, by virtue of the above provisions of the special Act, extended to estimated expenses. MAYOR, ALDERMEN, AND BURGESSES OF WEST HAM *v.* GRANT [331

LUNATIC—*Sale under Settled Land Act—Tenant in Tail—Sale of Undivided Shares to co-Owner—Settled Land Act*, 1882, *s.* 62.] The Court will give leave to the committee of a lunatic tenant in tail to take proceedings under the Settled Land Act, 1882, for the sale of his undivided shares to the owner of the other shares.—*In re Weld* (28 Ch. D. 514) considered. *In re* GAITSKELL (A LUNATIC) - - - - C. A. 416

MAINTENANCE - - - - 481
See CHAMPERTY.

—— - - - - - - - 449
See UNDUE INFLUENCE.

MANAGER OF BUSINESS—Soliciting customers —Injunction - - - 49
See RESTRAINT OF TRADE. 2.

MARRIED WOMAN - - - 165, 418, 461
See HUSBAND AND WIFE. 1, 2, 3.

MAXIM OF LAW—Actio personalis moritur cum personâ - - - - 543
See CONFLICT OF LAWS.

MEMBERS OF COMPANY—Meeting—Power of
See COMPANY. 2. [170

MISDESCRIPTION - - - 45, 601
See VENDOR AND PURCHASER. 1, 3.

MORTGAGE—*Power of Sale—Lord Cranworth's Act* (23 & 24 *Vict. c.* 145), *ss.* 11, 15—*Equitable Mortgage by Deed—Power to sell and convey—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 71—*Repeal.*] An equitable mortgagee in fee, by deed made before 1882, by a mortgagor who has the legal estate, can, under Lord Cranworth's Act, ss. 11, 15, sell and convey the legal estate; and that notwithstanding sect. 71 of the Conveyancing and Law of Property Act, 1881. *In re* SOLOMON AND MEAGHER'S CONTRACT [508

2. —— *Power of Sale—Sale by Mortgagee to Company in which he is a Shareholder.*] Three mortgagees in possession, of whom F. was one, and acted as their solicitor in the transaction, sold under the powers of sale in their mortgage deed to a company formed for the purpose of purchasing the property. The company was to some extent promoted by F., who became the solicitor to the company and had a substantial interest as a shareholder:—*Held* (affirming the decision of Chitty, J.), that the sale could not be set aside on the simple ground that F. was a shareholder in the company, for that a sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to himself along with other people.—But, *held*, that there was such a conflict of interest and duty in F., of which the company had notice, as to throw upon them the burden of upholding the sale:—*Held*, that the company had discharged themselves of this burden by shewing that F. had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale. FARRAR *v.* FARRARS, LIMITED - - - C. A. 395

3. —— *Priority—Negligence—Omission to obtain Title Deeds—Postponement of first Equitable Mortgagee to second.*] In order to postpone an equitable mortgagee to another equitable mortgagee whose security is of later date, it is not necessary, as it would be in order to deprive a legal mortgagee of the advantage of the legal estate, to shew that the first mortgagee has been guilty of negligence amounting to, or which is evidence of, fraud. Negligence, such as omission to obtain possession of or to make inquiries about the title-deeds, may be sufficient.—*Northern Counties of England Fire Insurance Company* v. *Whipp* (26 Ch. D. 482) distinguished. FARRAND *v.* YORKSHIRE BANKING COMPANY - - - 182

—— Costs of mortgagee - - - 338
See SETTLED LAND ACT. 2.

—— Undue influence—Bonus to mortgagee 449
See UNDUE INFLUENCE.

NEWSPAPER—Copyright - - 425, 500
See COPYRIGHT. 1, 2.

NUISANCE—Covenant for quiet enjoyment 71
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—— Restrictive covenant - - - 80
See COVENANT. 1.

PARLIAMENT—Member of—Privilege from arrest - - - - 190
See Arrest.

PARTICULARS OF OBJECTION—Patent suit—Certificate—Costs - - - 132
See Patent.

PARTNERSHIP—Arbitration - - 579
See Arbitration.

PATENT—*Particulars of Objection—Certificate—Costs—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 6.] The Court of Appeal in reversing the decision of the Court below in favour of a patent, has jurisdiction to grant the Defendant under sect. 29, sub-sect. 6, of the Patents, Designs, and Trade Marks Act, 1883, a certificate that his particulars of objection to the patent were proven, or were reasonable and proper, so as to entitle him to be allowed on taxation costs in respect of such particulars. Cole *v.* Saqui and Lawrence - C. A. 132

PAYMENT—Out of Court - - - 386
See Lands Clauses Act. 2.
—— Time and place of—Condition - 357
See Condition.

PENDING BUSINESS—Solicitors' Remuneration Act - - - - - 637
See Solicitor. 3.

PENSION—Officer of company—Power of—Meeting of members - - - 170
See Company. 2.

PERU—Law of - - - - - 543
See Conflict of Laws.

PHOTOGRAPH—Copyright - - - 345
See Copyright. 3.

POLICY OF INSURANCE—Condition not to assign - - - - 5
See Settlement. 1.

POWER—*Will—Construction—Special Power of Appointment.*] A testatrix devised, bequeathed, and appointed her residuary estate, including all property over which she should have at her death a power of appointment, on trust, after payment thereout of debts, testamentary and funeral expenses, to apply so much as the trustees should think fit of the income during the minority and spinsterhood of her only child, a daughter, for her maintenance and to accumulate the surplus, and on the daughter attaining twenty-one or marrying the whole to her for life, with remainders over. The testatrix had a power of appointment among her children over property settled in default of appointment on such children at twenty-one or marriage:—*Held*, that the power was not executed.—Observations on *In re Swinburne* (27 Ch. D. 696). *In re* Cotton. Wood *v.* Cotton 41

POWER OF SALE—Mortgage - 395, 508
See Mortgage. 1, 2.

PRACTICE—*Appeal—Time for appealing—Order on further Consideration and Summons to vary Certificate—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15*a*.] A cause came on for further consideration and on summons to vary the Chief Clerk's certificate. An order dismissing the summons and an order on further consideration were drawn up separately, bearing the same date. About four months afterwards a party gave notice of appeal against both orders, and the objection

PRACTICE—*continued.*

was taken that the appeal from the dismissal of the summons was out of time:—*Held*, that the two orders were in substance one order, and that the appeal ought to be allowed to proceed. Marsland *v.* Hole - - - - C. A. 110

2. —— *Appeal—Extension of Time to appeal—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 15; *Order* LXIV., *r.* 7.] L. & N., and other occupiers of houses in a London parish, were sued by the lay impropriator for an account and payment of sums payable in lieu of tithes under the statute 37 Hen. 8, c. 12. No payment appeared ever to have been made in respect of any of the houses occupied by the defendants. L. & N. pleaded only the Tithe Prescription Act (2 & 3 Will. 4, c. 100). Others of the defendants pleaded both that statute and the Statute of Limitations (3 & 4 Will. 4, c. 27). Kay, J., held that the former Act was a good defence, and dismissed the action, the question as to the Statute of Limitations not being argued. The Plaintiffs appealed. The Court of Appeal held that the statute 2 & 3 Will. 4, c. 100, was no defence, and remitted the case to be argued on the Statute of Limitations. Kay, J., on the 16th of July, 1885, held that the Statute of Limitations was no defence, and gave judgment for the Plaintiffs. Some of the Defendants (not including L. & N.) appealed, and the Court of Appeal dismissed their appeal. They then appealed to the House of Lords, which on the 10th of August, 1888, allowed the appeal and dismissed the action as against the Appellants, holding that there was a good defence under the Statute of Limitations. In December, 1888, L. & N. applied for leave to appeal from the judgment of the 16th of July, 1885, stating that the action was defended in their name by their landlords, who were bound to indemnify them, that the landlords were trustees of an estate which was being administered by the Court, and that the Judge had declined to sanction their appealing. It was admitted that the case of L. & N. was the same as that of the other Defendants:—*Held*, by Cotton and Bowen, L.JJ., that the fact that the Judge in the administration action had declined to give leave to appeal was no excuse for not appealing in due time, but that it would be unjust for these Defendants not to have an opportunity of appealing from a judgment which the House of Lords had pronounced to be wrong, and that leave to appeal ought to be given.—Before the order had been drawn up, the application, by leave of the Court, came on for re-argument, together with an application by H., another Defendant, for leave to appeal. It was shewn that after the time for appealing had expired the tithes payable in respect of L. & N.'s property had been sold and paid for, and a compromise as to the tithes of the parish had been carried out by Act of Parliament, which must be taken to have gone on the footing that H. was liable to pay tithes:—*Held*, by Cotton, Lindley, and Lopes, L.JJ., that under these circumstances leave to appeal ought not to be given either to L. & N. or to H., and, *semble*, that even apart from those circumstances it ought not to be given, the Applicants not shewing any special circumstances. Esdaile *v.* Payne [C. A. 520

PRACTICE—*continued.*

3. —— *Attachment—Rules of Supreme Court*, 1883, *Order XLIV., r.* 2.] An application for leave to issue a writ of attachment may be properly made in Chambers, and (subject to the rule that an order leading to imprisonment must be made by the Judge personally) may be dealt with by the Chief Clerk.—*Davis* v. *Galmoye* (39 Ch. D. 322) explained. DAVIS *v.* GALMOYE - 355

4. —— *Costs — Taxation — Administration Action—Delay—Rules of Supreme Court*, 1883, *Order LXV., r.* 11—*Costs out of Estate.*] The Court will not permit the costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of an estate under its care.—The amount of costs allowed by a Taxing Master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate.—An administration action, which was commenced in May, 1875, came on in November, 1887, upon second further consideration. The Judge finding that the costs would probably amount to nearly the whole value of the estate, and believing that there had been unreasonable delay in the conduct of the proceedings, directed the Taxing Master under Order LXV., r. 11, to inquire and report as to the delay and the costs occasioned thereby.—The Taxing Master reported that there had been great delay in the suit caused by the conduct of the solicitor for the Plaintiff, and disallowed considerable sums from the costs as between the various solicitors and their clients.—The Judge ordered that only a portion of the costs allowed by the Taxing Master to the several parties, including the costs of the Plaintiff, who was a trustee, should be paid out of the estate; and the Court of Appeal affirmed this decision. BROWN *v.* BURDETT - - - - C. A. 244

5. —— *Death of one of several Plaintiffs before Judgment—Application by Executors after Judgment to carry on Action against the Defendants—Rules of Supreme Court*, 1883, *Order XVII., r.* 4.] An action for damages was brought by several Plaintiffs having separate causes of action. Two of the Plaintiffs died before the trial, but no application was made to put off the trial, and judgment was given for the Defendants and the action dismissed. The executors of the deceased Plaintiffs applied under Order XVII., r. 4, for an order to carry on the action against the Defendants:—*Held* (affirming the decision of Kekewick, J.), that the order ought not to be made: Cotton, L.J., holding that the Court had no jurisdiction to make such an order after final judgment: and Lindley and Lopes, L.JJ., holding that whether the Court had jurisdiction or not, it was not necessary or desirable to make such an order in the present case. ARNISON *v.* SMITH - - - - - C. A. 567

6. —— *Reference to Referee—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 56.] The power given by the Judicature Act, 1873, s. 56, to refer "any question arising in any cause or matter" to an Official or Special Referee applies only to questions which must necessarily be decided in the cause or matter, and not to questions which it may prove unnecessary to decide.—Such reference may be directed before the trial.—The

PRACTICE—*continued.*

Plaintiff sued for rescission of a contract of partnership between him and the Defendant, and for damages, on the ground that he had entered into the partnership on the faith of false representations made by the Defendant as to the amount of his professional income. The Defendant by his defence denied having made any positive statement as to the amount of the income, and stated that the Plaintiff had for months before the partnership was entered into attended at his office as clerk, and had full access to the books, and that the Plaintiff had expressed himself satisfied with the business. It further appeared that the Plaintiff had continued for nearly four years in the partnership, which was then dissolved by agreement, and that he had never complained to the Defendant of misrepresentation. Mr. Justice North, in Chambers, after notice of trial, ordered, on the application of the Plaintiff, a reference as to the amount of the Defendant's profits for the six years immediately preceding the partnership: —*Held*, by the Court of Appeal, that as the question what the Defendant's profits were would be immaterial unless it was established that the Defendant had made a positive statement as to their amount, and that the Plaintiff had entered into the partnership in reliance on such statement, and that the Plaintiff had not by his conduct lost the right to complain of misrepresentation, the question referred was one which might never arise, and that the reference ought to be discharged. WEED *v.* WARD - - C. A. 555

—— Bombay Civil Fund—Costs - - 288
See BOMBAY CIVIL FUND.

—— Costs—Winding-up petition - - 52
See COMPANY. 5.

—— Patent suit - - - - 132
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PRESCRIPTION—Light - - - 21
See LIGHT.

PRINCIPAL AND SURETY—Discharge of surety
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See RAILWAY COMPANY. 2.

PRIVILEGE—Member of Parliament—Debtors Act - - - - - 190
See ARREST.

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See HUSBAND AND WIFE. 1.

PUBLIC HEALTH ACT - - 55, 331, 572
See LOCAL GOVERNMENT ACTS. 1, 2, 3.

PURCHASE-MONEY—Interest on - - 563
See VENDOR AND PURCHASER. 4.

—— Settled Land Act—Interim investment 594
See SETTLED LAND ACT. 1.

RAILWAY COMPANY—*Arbitration—Jurisdiction—Waiver of Right to insist on Arbitration—Railway Companies Arbitration Act*, 1859 (22 & 23 *Vict, c.* 59, *ss.* 4, 26.] Where railway companies

RAILWAY COMPANY—*continued.*
have entered into an agreement to submit matters in dispute to arbitration, under the provisions of the 4th and 26th sections of the Railway Companies Arbitration Act, 1859, it is obligatory on the Court to give effect to the agreement for arbitration if either of the parties insist on it; but the Court is not deprived of its jurisdiction to determine the matters in dispute if neither party insists on an arbitration. And in a case where the defendant had in his pleadings insisted on his right to arbitration, but had failed to raise the point at the hearing, and had gone into evidence on the merits, the Court of Appeal refused to allow the point to be raised on the appeal. London, Chatham and Dover Railway Company *v.* South-Eastern Railway Company [C. A. 100

2. —— *Debenture-holders—Superfluous Lands —Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 23—*Judgment Law Amendment Act*, 1864 (27 & 28 *Vict. c.* 112).] Sect. 23 of the Railway Companies Act, 1867, does not give to creditors of a railway company in respect of mortgages, bonds, or debenture-stock, any lien or charge which they did not possess before the Act, so as to entitle them to payment in priority out of the proceeds of surplus lands of the company, which have been sold on the application of the judgment creditors of the company. *In re* Hull, Barnsley, and West Riding Junction Railway Company - - - C. A. 119

—— Lands Clauses Act—Disputed interest 268
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—— Sale of superfluous lands - - 34
See Lands Clauses Act. 3.

RATIFICATION—Ultrà vires act of directors 135
See Company. 3.

REDUCTION OF CAPITAL - - - 363
See Company. 4.

REFEREE—Reference after trial - - 555
See Practice. 6.

REGISTRATION—Trade-mark - 620, 649
See Trade-mark. 1, 2.

REMUNERATION — Solicitors' Remuneration Act - - 441, 471, 475, 628, 637
See Solicitor. 1—5.

REPAIRS—Settled estate—Expenditure of trust money—Jurisdiction - - 512
See Trustee. 3.

RESIDUE—Intestacy as to share - - 159
See Will. 3.

RESTRAINT OF TRADE—*Bond — Condition— Injunction — Penalty — Liquidated Damages.*] The Defendant on entering the service of the Plaintiffs, a banking company, executed a bond in the penal sum of £1000, the condition of which was that it should be void if he should perform his duties in the manner therein mentioned, and also if he should pay to the Plaintiffs £1000 as liquidated damages, in case he should at any time within two years after his leaving the service of the Plaintiffs, accept any employment in any other bank within twenty miles of the Plaintiffs' bank. The Defendant resigned his employment in the Plaintiffs' bank

RESTRAINT OF TRADE—*continued.*
and immediately entered the service of a rival bank in the same town. The Plaintiffs brought an action claiming an injunction to restrain the Defendant from holding employment in any rival bank. The Defendant was willing and offered to pay the penal sum of £1000:—*Held*, that the Defendant could not satisfy his obligation by paying the penal sum; but that there was an agreement between the parties, to be implied from the bond, that the Defendant should not enter into the service of a rival bank, which could be enforced in a Court of Equity, and that the Plaintiffs were entitled to an injunction. National Provincial Bank of England *v.* Marshall - - - C. A. 112

3. —— *Receiver and Manager of Business— Injunction.*] A business was carried on under the order of the Court for ten years by a receiver and manager not previously engaged in business. On proposals for a purchase of the business under the order of the Court, the Court refused to restrain the receiver and manager from soliciting orders from or doing business with the present customers. *In re* Irish. Irish *v.* Irish [49

RESTRAINT ON ALIENATION—Validity 585
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RESTRAINT ON ANTICIPATION - - 418
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REVERSION—Sale of—Undervalue - 312
See Vendor and Purchaser. 5.

REVIVOR—Death of one of several Plaintiffs
See Practice. 5. [567

ROAD—Repairs of - - - - 572
See Local Government Acts. 1.

RULES OF SUPREME COURT, 1883, Order XVII., r. 4 - - - - - 567
See Practice. 5.

—— **Order XLI., r. 3** - - - 475
See Solicitor. 2.

—— **Order XLII., r. 16** - - - 475
See Solicitor. 2.

—— **Order XLIV., r. 2** - - - 355
See Practice. 3.

—— **Order LVIII., r. 15** - - - 520
See Practice. 2.

—— —— **r. 15a** - - - - 110
See Practice. 1.

—— **Order LXIV., r. 7** - - - 520
See Practice. 2.

—— **Order LXV., r. 11** - - - 244
See Practice. 4.

SALE—Remuneration of solicitor - - 441
See Solicitor. 5.

—— Settled Land Act—Lunatic—Co-owner 416
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—— Superfluous land—Railway company 34
See Lands Clauses Act. 3.

SEPARATE ESTATE - - 418, 461
See Husband and Wife. 2, 3.

SETTLED LAND ACT—*Sale—Money representing Land—Interim Investment—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 34—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 33.] The proceeds of settled land sold under the Settled Estates Act, 1877, was invested under an order of the Court in Consols in the name of trustees appointed to receive the purchase-money till it could be applied to the purposes mentioned in the 34th section of that Act:—*Held*, that the trustee might sell the Consols and reinvest in securities mentioned in sect. 21 of the Settled Land Act, 1882. *In re* TENNANT - - 594

2. —— *Sale by Tenant for Life—Costs—Capital Money—Mortgagees of Life Estate—Consent*—45 & 46 *Vict. c.* 38, *s.* 20, *sub-ss.* 1, 2, *cl. ii.*; *s.* 21, *sub-s.* (*x*); *ss.* 46, 50, *sub-s.* 3, *and s.* 53.] The costs of obtaining the consent and concurrence of mortgagees of the life estate on a sale by the tenant for life are not costs "of or incidental to the exercise" of the statutory powers properly payable out of the capital money produced by the sale. *In re Beck* (24 Ch. D. 608) not followed on this point.—Dictum of North, J., in *In re Sebright's Settled Estates* (33 Ch. D. 429, 438) considered. CARDIGAN *v.* CURZON-HOWE - 338

—— Lunatic tenant in tail—Sale to co-owner
See LUNATIC. [416

—— Payment out of Court—Trustees for sale
See LANDS CLAUSES ACT. 2. [386

SETTLEMENT—*Covenant to settle after-acquired Property—Property acquired by Devise, Purchase, or otherwise—Divisible Covenant—Validity—Policy of Life Insurance—Condition in Policy against Assignment—Public Policy—Settlement of whole Property—Whether enforceable at Law or in Equity.*] A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition that "it should not be assignable in any case whatever":—*Held*, that the policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant, and that the covenant was divisible, and could be enforced as to that property by a Court of Equity.—Whether, if the policies had not come under any of the particulars specifically mentioned in the covenant, the covenant comprising the settlor's whole future property could have been enforced by a Court of Equity, *quære.*—*Held*, also, that the effect of the condition against assignment was merely to make the policy non-assignable at law, as it would have been prior to the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), and did not prevent the settlor from dealing with the beneficial interest in it in accordance with his covenant. *In re* TURCAN C. A. 5

2. —— *Settlor's own Property—Limitation to Settlor for life determinable on Alienation—Validity.*] A marriage settlement of the settlor's own property was made on trust to pay the income to himself "during his life, or till he shall become bankrupt, or shall assign, charge, or incumber

SETTLEMENT—*continued.*
the said income, or shall do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons;" and, from and after the determination of the trust in favour of the settlor, upon trust to pay the income to his wife during her life:—*Held*, that the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband. *In re* DETMOLD. DETMOLD *v.* DETMOLD - - - 585

—— Infant ward of Court—Jurisdiction - 290
See INFANT. 2.

SHARES—Preference and ordinary—Reduction of capital - - - - 363
See COMPANY. 4.

SOLICITOR—*Bill of Costs—Taxation—Attempted Sale by Auction—Auctioneer paid by Client—Lump Sum—"Commission"—Subsequent Sale by Private Contract—Scale Charges—Solicitors' Remuneration Act*, 1881—*General Order, August*, 1882, *rr.* 2 (*c*), 4, *Schedule I., part* 1., *rr.* 2, 11.] Before the General Order under the Solicitors' Remuneration Act, 1881, came into operation, property which was the subject of an administration action was offered for sale by auction and bought in, the auctioneer's remuneration for the attempted sale being paid by the client in a lump sum.—After the Order came into operation the property was sold by private contract.—The same solicitors acted throughout, and they made out their bill of costs as to the attempted sale by auction, under the old system, and as to the sale by private contract, under the old system, as altered by Schedule II. to the General Order.—The Taxing Master, in taxing this bill, disallowed all the charges other than disbursements contained therein with regard to the attempted sale by auction, and with regard to the sale by private contract; and he substituted for the latter the scale charges for negotiating the sale, and for deducing the title and perusing and completing the conveyance.—*Held*, that the Taxing Master had taxed the bill upon a wrong principle, and that the bill must be referred back to him to be dealt with upon the principles laid down by the House of Lords in *In re Newbould* (14 App. Cas. 1).—The word "commission" in rule 11 of Schedule I. part 1, must be construed as including a lump sum paid by the client to the auctioneer as his remuneration. BURD *v.* BURD - - 628

2. —— *Bill of Costs—Taxation—Interest on Costs—Solicitors' Remuneration Act*, 1881, *General Order, r.* 7—*Administration Action—Costs payable out of Fund*—1 & 2 *Vict. c.* 110, *ss.* 17, 18—23 & 24 *Vict. c.* 127, *s.* 27—*Rules of Supreme Court*, 1883, *Order XLI., r.* 3; *Order XLII., r.* 16.] Where, in an administration action, costs have been directed to be taxed, and when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special direction, payable on the costs. *In re* MARSDEN'S ESTATE. WITHINGTON *v.* NEUMANN [475

SOLICITOR—*continued.*

3. —— *Bill of Costs — Taxation — Pending Business — Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *r.* 6—*Right to elect.*] The right of a solicitor under rule 6 of the General Order in pursuance of the Solicitors' Remuneration Act, 1881, to elect that his remuneration shall be according to the old system as altered by Schedule II., may be exercised as to business pending at the time when the Order came into operation, and in such case the election may be made after the time when the Order came into operation, but must be made before any further work is done by the solicitor to which the scale charges, under the Order, would apply. —The judgment in an administration action contained no general direction for the sale of the testator's real estate, but under various separate orders made in the action, and before the Order under the Solicitors' Remuneration Act came into operation, sales and leases of parts of such estates were directed or sanctioned. After the Order came into operation, the Plaintiff's solicitor gave him notice that in all matters relating to the estate he proposed to charge according to the old system as altered by Schedule II.—In determining the sufficiency of this notice, it was *held* that the separate transactions ought in the taxation of the costs to be treated and dealt with as separate matters, and that the business ought not to be deemed to be "undertaken" until the time arose at which the solicitor had done some work after the Order came into operation which would be covered by the scales under the General Order. *In re* Love. Hill *v.* Spurgeon - - 637

4. —— *Bill of Costs — Taxation — Sale of Land out of Jurisdiction—Irish Land—Lord Ashbourne's Act, Purchase of Land (Ireland) Act*, 1885 (48 & 49 *Vict. c.* 73)—*Scale-Charge—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order under Rule* 2 (*a*), *Sched. I., Part I.*] The General Order under the Solicitors' Remuneration Act, 1881, fixing a scale charge does not apply to a sale of land not situated in England. —Thus, where an English solicitor carried out a sale under Lord Ashbourne's Act, the Purchase of Land (Ireland) Act, 1885, of land in Ireland belonging to a client, and employed an Irish solicitor to do so much of the work as had necessarily to be done in Ireland:— *Held*, that the English solicitor's remuneration was not regulated by Sched. I. part I., to the General Order under the Solicitors' Remuneration Act, 1881. *In re* Greville's Settlement - - 441

5. —— *Bill of Costs—Winding-up of Company—Official Liquidator—Employment of Solicitor—Taxation—Solicitors' Remuneration Act*, 1881, *Gen. Order, August*, 1882, *r.* 6.] On receiving notice from the solicitor, whom he has employed to act for him in the winding-up, that he elects to be paid for his work under Schedule II., and not according to the scale charge under the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, it is the duty of the official liquidator, in order to discharge his duty of protecting the assets of the company, to obtain the direction of the Judge in Chambers as to whether he ought to continue to employ a solicitor who requires payment on the more expensive footing.

SOLICITOR—*continued.*

In re United Kingdom Land and Building Association - - - - - 471

6. —— *Bill of Costs—Taxation more than Twelve Months after Payment of Bill—Application by Third Parties—Costs improperly paid to Solicitor out of Trust Estate, with Notice of Breach of Trust—Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 41.] The administratrix with the will annexed, of a testatrix, who was also tenant for life under the will, employed a solicitor in relation to the administration of the estate, and, as was alleged, paid his bill of costs out of moneys forming part of the capital of the estate. More than twelve months after the payment of the bill, some of the beneficiaries, as Plaintiffs, took out an originating summons against the administratrix, as Defendant. The summons was intituled in the matter of the estate of the testatrix, and also in the matter of the solicitor, and it was served on him, but he was not named as a Defendant. The summons asked for a reference of the bill to taxation, and that in taxing the costs the Master might certify what amount was properly chargeable against the capital of the trust estate, and what amount was properly payable by the Defendant personally, as tenant for life; and that, if it should appear that the bill was overpaid, the solicitor might be ordered to repay the amount certified to be overpaid to the Defendant.—It was suggested that the bill contained items which were not properly chargeable against the capital of the trust estate, and that the solicitor knew that he was being paid out of the capital of the trust estate, and had notice of the breach of trust at the time when he received payment:—*Held*, that the lapse of more than twelve months since payment was a bar to its taxation.—*Held*, also, on the authority of *In re Spencer* (30 W. R. 296; 51 L. J. (Ch.) 271), that, even if the solicitor had been made a Defendant to the summons, the relief asked against him could not have been obtained. — Whether any relief could have been obtained against him, *quære*. *In re* Jackson. *In re* Cottrell. Boughton-Leigh *v.* Boughton-Leigh - - - - 495

—— Costs—Notice of breach of trust - 370
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6 Anne, c. 18—*Tenants for Life* - - 589
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23 & 24 Vict. c. 127, s. 27—*Solicitors* - 475
See SOLICITOR. 2.

23 & 24 Vict. c. 145, ss. 11, 15—*Lord Cranworth's Act* - - - - 508
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44 & 45 Vict. c. 41, s. 39—*Conveyancing and Law of Property* - - - 418
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See INFANT. 1. [200

STAYING PROCEEDINGS—Agreement for arbitration - - - - 579
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See LOCAL GOVERNMENT ACTS. 2.

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TENANT FOR LIFE—6 *Anne, c.* 18—*Cestui que Vie—Executory Devise.*] The devisee of land in

TENANT FOR LIFE—*continued.*
case of the death of another without leaving issue is a person who has a claim in expectancy to an estate after the death of a person, within the meaning of 6 Anne, c. 18, s. 1.—A close of land was devised to M. A. T. in fee, but in case she should die without leaving lawful issue, to others. M. A. T. married and left her husband, having had no issue. He died in May, 1888. Orders were made in June and August, 1888, respectively that A. F., who had bought the interest of M. A. T., should produce her first at W. church door, secondly, in Court; she not having been produced, and A. F. not having proved that she was alive:—The Court ordered that she should be taken to be dead. *In re* Pople. *Ex parte* Baker - - - - - - 589

—— Sale under Settled Land Act - - 338
See Settled Land Act. 2.

TITLE DEEDS—Possession of—Negligence—Priority - - - - 182
See Mortgage. 3.

TRADE-MARK — *Registration — Class — Mark affixed—Common Law Right—No one deceived—Patents, Designs and Trade Marks Act* (46 & 47 *Vict. c.* 57), *s.* 65.] A trade-mark registered under one of the classes given by the rules, but in respect to some particular articles in that class, will be protected under the Patents, Designs and Trade Marks Act as to those articles only.—A trade-mark need not be actually affixed to the article. It is sufficient if the trade-mark is on the cover or wrapper in which the article is sold.—The common law rights of a tradesman using a trade-mark are not affected by the registration of the trade-mark, so that, if he has acquired a right to a trade-mark as to a certain class of goods, and the trade-mark as registered is confined to a part of that class of goods, he will be entitled to protection for the whole class of goods.—A tradesman must not advertise his goods as being those of another tradesman, and will be restrained from doing so, though it is not proved that any one had been deceived. Jay *v.* Ladler - - - - 649

2. —— *Registration—Foreign Trade Mark—Patents, Designs and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 103—*Application by Foreigner to register Trade-Mark which had been registered in his own Country — Period within which Application should have been made—International Convention for Protection of Industrial Property.*] A company had, in America, where they had carried on business, registered a trade-mark in 1885. The Patents, Designs and Trade Marks Act was passed in August, 1883, and sect. 103 enacted that if Her Majesty was pleased to make any arrangement with a foreign state for the mutual protection of trade marks, then any person who had applied for protection of a trade-mark in such foreign state should be entitled to registration under the Act, provided that the application was made within four months from applying for protection in the foreign state.—The International Convention for the Protection of Industrial Property was signed in Paris in March, 1883, and it contained a provision that every trade-mark registered in the country of origin should be admitted to registration, and

TRADE-MARK—*continued.*
protected in all countries of the Union.—The Convention was in March, 1884, acceded to by the Government of Great Britain, and in July, 1887, by the Government of America, and the provisions of sect. 103 of the Act were by an Order in Council in July, 1887, made applicable to America.—In February, 1888, the company applied to the Comptroller-General to register their trade-mark under the provisions of sect. 103, and of the International Convention; and he refused to do so:—On appeal to the Court,—*Held,* that the application for registration could be dealt with only under the provisions of the Act of 1883; and that as it was not made within four months as required by the provisions of sect. 103, it must be refused.—*Semble,* that the provisions of the Convention of 1883, which stated that every trade-mark duly registered in the country of origin should be admitted for registration and protection in the form originally registered in all the countries of the Union, now bound Great Britain, but that the Act of 1883 did not afford the means of carrying out the provisions of the Convention, *In re* Californian Fig Syrup Company's Trade-Mark [620

TRUSTEE—*Breach of Trust—Payments made by, for Costs, to Solicitor—Claim to have the Moneys repaid to the Trust Estate—Constructive Trustee—Right of Trustee to employ Solicitor, Auctioneer, or Stockbroker, and to pay them out of Trust Estate.*] In order that a solicitor of a trustee may be debarred from accepting payments out of the estate in respect of costs properly incurred, notice must be brought home to him that at the time when he accepted them the trustee had been guilty of a breach of trust, such as would preclude him from resorting to the trust estate for payment of costs.—A trustee allowed his solicitors to retain costs out of the trust estate. At the time the solicitors had notice that the trustee had committed a breach of trust in secretly buying for himself part of the trust estate. In an administration action the trustee made default in payment into Court of the balance found to have come to his hands:—*Held,* that the solicitors could not be compelled to pay in the sums received by them out of the estate. *In re* Blundell. Blundell *v.* Blundell - - 370

2. ——*Disclaimer by Conduct—Legal Estate.*] Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate. *In re* Birchall. Birchall *v.* Ashton [C. A. 436

3. —— *Repairs—Tenant for Life—Expenditure of Trust Money—Jurisdiction.*] Land and money were vested in the trustees of a settlement for the benefit of the husband and wife for their lives, and after their deaths for their children. The buildings on a farm on the land were so much out of repair as to make the farm untenantable:—*Held,* that the Court had power under its original jurisdiction to sanction the expenditure of part of the money in repairing the farm buildings. Conway *v.* Fenton - 512

—— Director of company - - - 141
See Company. 1.

TRUSTEE—*continued.*

—— Purchase-money—Lands Clauses Act 386
See LANDS CLAUSES ACT. 2.

—— Trustee—Refusal to convey - - 14
See TRUSTEE ACTS.

—— Solicitor—Power to make charges - 1
See WILL. 5.

TRUSTEE IN BANKRUPTCY—Assignment of cause of action - - - 481
See CHAMPERTY.

TRUSTEE ACTS—*Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 2—*Wilful Refusal or Neglect.*] A refusal by a trustee to convey is not wilful within the meaning of the Trustee Extension Act, sect. 2, if the title of the person asking for the conveyance is disputed and the trustee entertains a bonâ fide doubt as to it.—A copyhold was vested in a trustee under the will of M. The beneficial interest was vested as follows:—A., B. and C. one-sixth each, D. one-fourth. As to the remaining fourth it was questionable whether under the will of E. it had passed to A., B., C. and D. in equal shares, or to S. T., since deceased, of whose will A. and F. were the trustees. The copyhold was sold to X. and A., B., C. and D. as beneficial owners, and according to their respective shares and interests, and A. and F., as trustees, conveyed it by deed to X., the purchase-money being paid thus—to A., B., and C. one-sixth each, to D. one-fourth, and the remaining fourth to A. and F. C. shortly afterwards brought his action against the trustee under M.'s will, and A. and F., as trustees of S. T.'s will, to establish that no share had passed under S. T.'s will, and that the purchase-money ought to have been differently apportioned. Bacon, V.-C., held that the fourth share had passed under the will of S. T., and that the purchase-money had been rightly apportioned, and he accordingly dismissed the action. After this X. applied to the trustee to surrender to him, which the trustee declined to do. X. then petitioned for a vesting order. Before the petition was heard, A. gave notice that she reserved all her rights under the will of E.:—*Held*, that the refusal of the trustee was not wilful within the Trustee Act Extension Act, 1852, sect. 2, and that a vesting order could not be made.—Decision of North, J., affirmed. *In re* MILLS' TRUSTS [C. A. 14

UNDERVALUE—Sale of reversion - - 312
See VENDOR AND PURCHASER. 5.

UNDUE INFLUENCE—*Mortgage—Solicitor and Client—Advances—Bonus—Champerty and Maintenance—Collateral Advantage—Expectant Heir—Redemption.*] J., a young man in very poor circumstances, was Defendant in a probate action in which he claimed a share of certain real estate as co-heir of the deceased. To enable him to conduct his defence he borrowed money from K., a solicitor, to whom he executed a mortgage whereby he, J., covenanted to employ a particular person as his solicitor in the action, and, if he should be successful in the action, to pay K. £225 "by way of bonus;" and it was provided that K. should make such further advances to J. as and when K. should think fit to meet any further necessities of J., or to be applied in or towards the costs of the action. The deed then charged J.'s interest in the real estate in question with present and future advances and interest at 5 per cent., and the £225 bonus. J. received a further advance from K., making a total of £100 for advances, and was ultimately successful in establishing his claim in the probate action:—*Held*, in an action by J. to redeem: (1) that the mortgage was tainted with champerty; (2) that the bonus was illegal as being a collateral advantage stipulated for by a mortgagee; and (3) that the transaction was voidable as an undue advantage obtained from J. when under the pressure of distress and in a position analogous to that of an expectant heir; and, accordingly, redemption was decreed on payment only of the sums actually advanced to J., with interest. JAMES *v.* KERR - - - - - 449

USER—Light - - - - - - 21
See LIGHT.

VALIDITY—Settlement—Restraint on alienation *See* SETTLEMENT. 2. [585

VALUATION—Purchase at a valuation - 563
See VENDOR AND PURCHASER. 4.

VENDOR AND PURCHASER—*Condition of Sale — Misdescription — Measure of Compensation.*] Land was sold under a condition that in case of misdescription compensation should be paid. A road over the land was described in the particulars as "made up." The Court held there was a misdescription as to the extent to which the road was made up:—*Held*, that the measure of compensation to the purchaser was not the sum it would cost to make up the road to the extent represented; but the difference between the value of the property as it existed at the time of purchase and the value it would have had if the road had been "made up." *In re* CHIFFERIEL. CHIFFERIEL *v.* WATSON - - - - - 45

2. —— *Conveyance—Solicitor—Receipt—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 56.] A solicitor producing a deed containing a receipt must, in order to discharge a person paying him, be acting for the person sought to be charged, and having the deed in his office is not equivalent to production of it. DAY *v.* WOOLWICH EQUITABLE BUILDING SOCIETY 491

3. —— *Misdescription—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Contract for Sale—Leasehold Business Premises—Lease—Restrictive Covenants—Defect in Title—Jurisdiction—Return of Deposit.*] At a sale by auction property described in the particulars as "leasehold business premises" was put up for sale under conditions providing that the title should commence with the conveyance to the vendors, and that no objection should be made in respect of anything contained in the lease. Nothing was said in the particulars or conditions as to the contents of the lease; no opportunity was given to intending purchasers to inspect the lease, and the property was bought by a purchaser who had not in fact inspected it.—After the sale the purchaser discovered that the lease contained covenants restricting him from carrying on upon the premises any trade or business or doing any act

VENDOR AND PURCHASER—*continued.*

to the nuisance, annoyance, or damage of the lessors or the adjoining tenants, or using the premises as a public-house. He then took out a summons under the Vendor and Purchaser Act, 1874, for a declaration that the vendors had not shewn a good title under the contract, and for a return of the deposit which he had paid on the purchase:—*Held* (first), that as the property was put up for sale as business premises the purchaser was entitled to have an assignment of property on which he could carry on any business, subject only to the restrictions imposed by the general law, or in force as to any particular trade.—*Held* (secondly), that as the covenant imposed serious restrictions upon the use of the premises as business premises, the purchaser was entitled to a declaration that the title was not such as he could be compelled to accept, but *held* (without prejudice to his right to bring an action for return of the deposit), that he was not entitled to any further relief upon the summons. *In re* Davis & Cavey - - - - - - 601

4. —— *Interest—Contract to purchase at a Valuation—Damages.*] The Defendant agreed with the Plaintiff, his tenant of a mill, to purchase at a proper valuation at the expiration of the tenancy some machinery which the Plaintiff was setting up in the mill, nothing being said about interest on the purchase-money. The tenancy expired at Michaelmas, 1885. The Defendant refused to purchase the machinery, and in February, 1887, the Plaintiff commenced an action for specific performance, not specifically mentioning in his statement of claim either interest or damages. The action was dismissed, but in November, 1888, the Court of Appeal reversed this decision and gave a judgment directing a reference to an official referee to ascertain the value, and ordering the Defendant to pay it when ascertained. The question as to interest was not raised. The Plaintiff applied to vary the minutes by directing the Defendant to pay the value with interest from Michaelmas, 1885. The Court made the order for payment of interest only from the referee's report, and declined to decide anything further on that application, but gave leave to the Plaintiff if so advised to apply after the report for payment of prior interest. The report was made in February, 1889, and the Plaintiff then applied to the Court to order interest from Michaelmas, 1885:—*Held*, that the Plaintiff was entitled, by way of damages for delay, to interest at £4 per cent. on the amount of the valuation from Lady Day, 1886, on which day the Defendant had taken possession, the Plaintiff having up to that time remained in possession rent free as caretaker. Marsh *v.* Jones [C. A. 563

5. —— *Unfair Dealing—Sale—Reversion—Under-value—Setting aside Sale—*31 *Vict. c.* 4—*Costs.*] Where a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and à fortiori if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction

VENDOR AND PURCHASER—*continued.*

is impeached, the onus of proving that the purchase was fair, just, and reasonable.—Sales of reversionary interests set aside, the vendors being poor, ignorant men, selling at a considerable under-value, and having no professional adviser other than the solicitor to the purchasers who gave to them a great advantage in the transactions.—There being no evidence of moral fraud on the part of the purchasers, and allegations of misconduct on their part having been made and not substantiated, no costs were given. Fry *v.* Lane. *In re* Fry. Whittet *v.* Bush - 312

—— Mutual covenants - - - 596
See Covenant.

—— Power of sale—Mortgage - - 395
See Mortgage. 2.

VOLUNTARY WINDING-UP - - 361
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WARD OF COURT - - - - 290
See Infant. 2.

WATER-MAINS—Power of local board — Surveyor's report - - - 55
See Local Government Acts. 2.

WILL — *Construction — Die without "leaving" Issue.*] A testator bequeathed personal estate in trust for K. B. for life and after his death for R. B. and the heirs male of his body, and in case R. B. died without leaving issue male for J. B. R. B. died in the lieftime of K. B., having had issue one son only, who died without issue in his father's lifetime:—*Held* (affirming the decision of North, J.), that the gift over to J. B. took effect, for that the cases where "leaving" had been construed "having" in order to prevent a clear previous vested gift from being divested, did not apply where it was plain that the vested gift was in some event to be divested.—*White* v. *Hight* (12 Ch. D. 751) overruled. *In re* Ball. Slattery *v.* Ball - - - - C. A. 11

2. —— *Construction—"Rents, dividends, and annual proceeds," Direction to pay Debts out of—Payment of Debts out of Corpus—Liability of Executrix Tenant for Life to recoup Corpus—General Legacy—Specific Legacy.*] A testator bequeathed to his wife, subject to the payment of his debts, all the cash in his house at the time of his death, and directed that in case such money should be insufficient for such payment the deficiency should be paid out of the rents, dividends, and annual proceeds of all his estate. He also specifically bequeathed property to his wife during her life, and appointed her his executrix, and she paid his debts in part out of the corpus of his estate:—*Held*, that the words, "rents, dividends, and annual proceeds," were, having regard to the context, equivalent to "annual rents, dividends, and proceeds," and that the direction for payment of debts thereout did not create a charge upon the corpus of the estate; but, *held*, that as the debts had been in fact partially paid out of corpus, and the testator had not provided for such an event, the executrix could not be called upon to recoup the corpus out of the income of her specifi-

WILL—*continued.*

cally bequeathed property.—The principle of *Tewart* v. *Lawson* (Law Rep. 18 Eq. 490) adopted and followed.—The testator bequeathed a leasehold public-house upon trust for sale, and out of the proceeds of such sale, and the rents and profits until sale, he gave a legacy to X. Y., and as to the residue of such proceeds, and rents and profits, and all other the residue of his real and personal estate, he gave the same to his two daughters:—*Held*, that the gift of the residue of the proceeds of the sale of the public-house was not specific, but that such residue formed part of the general residuary estate of the testator. *In re* Green. Baldock *v.* Green - - 610

3. —— *Construction—Residue—Intestacy—Gift of Residue to Executors or Administrators of M. and J.—Gift of Residue by J. to Testator.*] A testator gave his residuary estate to M. & J. and in case of their decease bequeathed what he had bequeathed to them to their executors or administrators. M. and J. both predeceased the testator. J. by her will bequeathed to the testator the residue of her property, which comprised the property devolving on her representatives under the testator's will:—*Held*, that in the events which had happened, one moiety of the testator's residuary estate was undisposed of by his will. *In re* Valdez's Trusts - - - - 159

4. —— *Construction—Wife—Life Interest to future Wife of Legatee—Divorce.*] A testator bequeathed a share of his residuary personal estate in trust for his son for life, and after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again:—*Held*, that the woman was not entitled to the income of the son's share.—*Bullmore* v. *Wynter* (22 Ch. D. 619) observed upon. *In re* Morrieson. Hitchins *v.* Morrieson - 30

WILL—*continued.*

5. —— *Gift to Attesting Witness—Power to Solicitor-Trustee to make Professional Charges—Wills Act* (1 *Vict. c.* 26), *s.* 15.] A testatrix appointed B. & P. (a solicitor), executors and trustees of her will, and declared that any trustee of her will who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. P. was one of the attesting witnesses:—*Held* (affirming the decision of Stirling, J.), that P. was not entitled to any profit costs for business done by him in relation to the estate, for that the right to make professional charges could only be claimed under the will, and was a beneficial interest under it, from claiming which he, being an attesting witness, was precluded by the Wills Act (1 Vict. c. 26), s. 15.—*In re Barber* (31 Ch. D. 665) approved. *In re* Pooley - - - - C. A. 1

—— Appointment under special power - 41
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—— Married woman—Probate—Rights of husband - - - - 165
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—— "Necessary" - - - - 55
See Local Government Acts. 2.

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—— "Wife" - - - - - 30
See Will. 4.

—— "Without leaving issue" - - 11
See Will. 1.

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